

## Occupational hazards

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# Occupational Hazards

*Life is largely a matter of expectation.*

Horace

Amir Paz-Fuchs and Yaël Ronen\*

## I.

### INTRODUCTION

In July 2011, another small episode was written into the history of the Israeli occupation of the West Bank. For the first time in forty-four years of occupation, Palestinian workers engaged in a collective dispute with their Israeli employer. Forty Palestinian workers in the Sal'it quarry, located in the West Bank east of Jerusalem, went on strike, demanding that the management, comprised of Jewish Israelis, guarantee them fair employment conditions (including pensions), refrain from arbitrary dismissals, and sign a collective agreement entrenching these terms. This event came in the wake of recent important and interesting legal developments, which have contributed to the shaping of economic relations between Israel and the Palestinians, individually and collectively. These developments, which have received relatively little attention from legal commentators, merit documentation and analysis. This Article aims to fill this gap in legal research with respect to the discrete area of labor law. In particular, it examines the law applicable to the employment of Palestinian West Bank residents in Israeli West Bank settlements, as developed by judgments of the Israeli National Labor Court and High Court of Justice.

Since 1967 and for the first two decades of Israel's occupation of the West Bank and the Gaza strip, the Palestinian workforce has relied in an incremental fashion on work in Israel and for Israelis in the occupied territories.<sup>1</sup> From

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\* Dr. Amir Paz-Fuchs is a senior lecturer at Ono Academic College. Dr. Yaël Ronen is a senior lecturer at Sha'arei Mishpat College. Earlier versions of this Article were presented at the workshop on Precarious Workers held by the Minerva Center for Human Rights at the Hebrew University (April 2011) and at the Society of Legal Scholars Conference, held at the University of Cambridge (September 2011). We are grateful for the thoughtful comments of the participants in the workshop as well to those of Guy Harpaz, Michael Karayanni, David Kretzmer, Virginia Montavlou, and Yuval Shany. The usual caveats apply.

1. For an account and analysis of Palestinian employment in Israel up to the end of the late

11.8% of the workforce (which was 173,300 in total) in 1971, the share of Palestinians employed in Israel rose to 39.2% (of 277,700 in total) by 1987. The employment of almost 40% of the workforce outside the local market has no parallel in the world.<sup>2</sup> Taking into account unregistered workers, some estimate that the figure is closer to 70%.<sup>3</sup>

Since the first intifada in 1987, and even more significantly since the eruption of the second intifada in 2000, the number of Palestinians granted entry permits to Israel has fallen dramatically, to a little over 10% (28,000).<sup>4</sup> Unemployment and poverty in the occupied territories has soared to over 50%, and those who were able searched for work in the settlements and in the Israeli-owned industries. An aggregation of available data suggests that the number of Palestinians lawfully employed by Israeli municipal councils and private enterprises in the West Bank (not including East Jerusalem) in agriculture, industry, construction and services is over 50,000.<sup>5</sup> The Civil Administration assessed that a further 15,000 Palestinians were employed unlawfully (without permits).<sup>6</sup>

The terms of employment of Palestinians in the Israeli settlements, and more specifically the law governing them, were challenged in regional labor courts in the late 1990s, when Palestinian employees of several public and private Israeli employers submitted claims against their employers, demanding certain employment rights and benefits in accordance with Israeli law.<sup>7</sup> The

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1990s see Guy Mundlak, *Power Breaking or Power Entrenching Law: The Regulation of Palestinian Workers in Israel*, 20 COMP. LAB. L. & POL'Y J. 569 (1999).

2. NEVE GORDON, ISRAEL'S OCCUPATION 81 (2008).

3. YEHEZKEL LEIN, BUILDERS OF ZION 8 (1999).

4. ISRAELI KNESSET, GOVERNMENT POLICY PAPER ON FOREIGN WORKERS 5 (2010) (in Hebrew).

5. According to an Israeli Government policy paper, 25,000 Palestinians are employed in Israel. See *id.* By the end of 2010, Palestinians were being employed in Israel, settlements, and in industrial zones in the West Bank. See UNRWA, *The West Bank Labour Market in 2008: A Briefing Paper 2009*, UNITED NATIONS RELIEF AND WORKS AGENCY, 8 Table 2 (2009), <http://www.unrwa.org/userfiles/201001196450.pdf> [hereinafter UNRWA].

6. GILAD NATAN, PALESTINIAN WORKERS IN THE ISRAELI SETTLEMENTS IN JUDEA AND SAMARIA I (2007).

7. Israeli courts, including labor courts, acquire jurisdiction upon service of documents to the defendant. According to the Rules of Procedure documents may be served in the occupied territories as if they were served in Israel. See Rules of Procedure (Service of Documents in the Administered Territories), 5729-1969 KT 2482, 458, Nevo Legal Database (by subscription) (Isr.). Under the instructions of the Military Advocate General (and later Attorney General of Israel and President of the Supreme Court) Meir Shamgar, the State has never relied on the plea of a lack of *locus standi* with respect to alien residents of territory not under Israeli sovereignty. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – The Initial Stage*, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 31, 43 n.56 (Meir Shamgar ed., 1982) [hereinafter MILITARY GOVERNMENT]. For an international legal analysis of the Supreme Court's competence to review military enactments, see Eli Nathan, *The Power of Supervision by the High Court of Justice over Military Government*, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 109 (Meir Shamgar ed., 1982).

principal question examined by the regional labor courts was whether the labor relations in question were governed by Israeli law or by the territorial law of the West Bank, which is based on Jordanian law. The regional labor courts determined that the employment relations in question were governed by Israeli law. The employers appealed to the National Labor Court (NLC), which reversed the regional courts' judgments.<sup>8</sup> While the NLC ruled that the labor relations between Palestinians and their Israeli employers in the settlements were governed by Jordanian law, it acknowledged that considerations of public policy and non-discrimination might require the application of certain rights guaranteed under Israeli law to Palestinian employees, on a case-by-case basis. The NLC remanded the cases back to the regional courts to be decided on their individual merits. An Israeli NGO, Worker's Hotline, submitted a petition to the Supreme Court sitting as the High Court of Justice (HCJ) against the NLC judgment.<sup>9</sup> The HCJ reversed the NLC's judgment, and ruled that the employment contracts of the Palestinian employees are in fact governed by Israeli law.<sup>10</sup>

The different analyses made by the NLC and the HCJ highlight the intersection of different areas of law: choice of law, public international law (in particular the law of occupation), and labor law. This intersection raises interesting tensions for two main reasons: First, public international law maintains sovereignty and territory as its central tenants, yet this centrality is undermined, insofar as labor law is concerned,<sup>11</sup> by the growing mobility of labor and capital that renders national boundaries somewhat less relevant. Second, while public international law regulates occupation of territory, the exceptional duration of Israel's occupation of the West Bank (and perhaps the Gaza strip) has led to an economic entanglement between Israel and the territories in a manner not predicted by the framers of the international legal structure, nor adequately addressed by the law of occupation. We argue that the analyses by the courts of the choice of law question, while ostensibly informed by the fact that it arose in the context of a labor conflict, did not take into account of the importance of labor law. In addition, we highlight the public international legal implications of the rulings.

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8. Labor Ct. (BS) 3000050/98 Givat Ze'ev v. Mahmoud 38 Labor Judgments 577 [2003] (Isr.). In Israel, labor cases are adjudicated, in the first instance, in regional labor courts. Appeals are reviewed by the National Labor Court (NLC). In exceptional cases, NLC decisions may be reviewed following a petition to the High Court of Justice (HCJ).

9. HCJ 5666/03 Worker's Hotline v. Nat'l Labor Ct. (Oct. 10, 2007), Nevo Legal Database (by subscription) (Isr.).

10. *Id.* at 1.

11. William B. Gould, *The Rights of Wage Earners: Of Human Rights and International Labor Standards*, 3 INDUS. RELATIONS L.J. 489 (1979); Guy Mundlak, *De-Territorializing Labor Law*, 3 L. & ETHICS HUM. RTS. 189 (2009); Brian Langille, *Core Labor Rights – The True Story*, 16 EUR. J. INT'L L. 409 (2005); Philip Alston, *'Core Labor Standards' and the Transformation of International Labour Law*, 15 EUR. J. INT'L L. 457 (2004); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007).

While the challenges explored here are intimately linked to the phenomenon of occupation, the increased swiftness with which private companies worldwide are able to cross borders and set up enterprises outside of their state of origin makes the following analysis highly relevant to businesses worldwide. Thus, a 2003 report prepared for the International Labor Movement profiles sixteen of the most prominent corporations operating in Iraq in a wide variety of service arenas.<sup>12</sup> These include energy (e.g., Halliburton and KBR), construction (e.g., Bechtel Group, Stevedoring Services of America, Black and Veatch, Louis Berger, and Parsons), telecommunications (e.g., MCI Worldcom), consulting (e.g. ABT and CAI), and more.<sup>13</sup> All the companies in the report already have experience in "transitional" and "post-war" crisis countries, and all have employed a low standard of labor relations with respect, *inter alia*, to unions and health and safety requirements.<sup>14</sup>

Part II of this Article provides a brief factual background. It describes the sources of labor law applicable in the West Bank, as well as the origins of, and judgment in, the *Worker's Hotline* case, which addressed the law applicable to the employment of Palestinians in the settlements. Part II concludes by explaining how employers have contravened the judgment's *raison d'être* by constructing employment arrangements that effectively circumvent the holding while staying loyal to its letter. We argue that such strategies are possible in part because of the HCJ's incorrect framing of the issue in the case. Part III addresses the law applicable to Israeli settlers in the West Bank, both generally and specifically with respect to labor law. It deals with a surprisingly common error concerning the legal basis that enables Israeli settlers to live in accordance with Israeli rather than Jordanian law. The understanding of the legal mechanisms applicable to Palestinian and to Israeli employees forms the basis for Part IV, which examines the actual significance of equality between employees, a principle extolled by the HCJ as a fundamental, for Palestinians working in the settlements. We argue that rather than pursuing equality in the applicable legal system, the HCJ should have pursued equality in the terms and conditions of work. We begin by considering the significance of each of these perceptions of equality. We argue that considerations of labor law and public international law militate against the blind pursuit of equality in the applicable legal system with respect to long-term occupation buttressed by forceful economic intervention. In this context, pursuing equality in the legal system risks obscuring an injustice both to individual interests and to collective ones, such as protection from annexation. We then explain the preference for pursuing equality as relating to conditions of work, and propose means by which this goal can be achieved. We conclude Part IV by indicating the economic reality that is

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12. U.S. LABOR AGAINST THE WAR, PROFILE OF U.S. CORPORATIONS AWARDED CONTRACTS IN U.S./BRITISH OCCUPIED IRAQ (2003), *available at* <http://www.uslaboragainstawar.org/downloads/CorpInvasionofIraq.complete.pdf>.

13. *Id.*

14. *Id.*

obscured by trite reference to equality, and caution that equality, an ostensibly laudable means of protecting a weak population, may be counterproductive if it is practiced as an abstract principle detached from the particular factual and legal context in which it is sought.

## II. BACKGROUND

### *A. Labor Law in the West Bank*

In the wake of the 1967 War, the territories occupied during the war, among them the West Bank, were placed under the administration of a military government, run by the Israel Defense Forces (IDF). Immediately upon its establishment, the military government proclaimed the law applicable in the West Bank, providing, *inter alia*:

2. The law which existed in the Region on June 7, 1967, shall remain in force, insofar as it does not in any way conflict with the provisions of this Proclamation or any other Proclamation or any Proclamation or Order which may be issued by me [i.e. the military commander], and subject to modifications resulting from the establishment of government by the Israeli Defense Force in the Region.

3(a). All powers of government, legislation, appointment and administration in relation to the region and its inhabitants shall henceforth vest in me alone and shall be exercised by me or by such person appointed by me or to act on my behalf.<sup>15</sup>

This proclamation was in line with the requirements of Article 43 of the Hague Regulations, which stipulate that the occupant "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."<sup>16</sup>

In consequence of the Proclamation and in line with the law of occupation, the prevailing local law in the West Bank (i.e., Jordanian law) remains in force unless amended or repealed by the enactments of the military government. The relationship between military enactments and local law was defined in a military enactment, which provided that "each security enactment has preference over any local law, even if it has not explicitly repealed the latter."<sup>17</sup>

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15. Proclamation Regarding Government and Law Arrangements (West Bank Region), 5727-1967, SH No. 2 (Isr.)

16. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex (Regulations Concerning the Laws and Customs of War on Land 1907), Oct. 19, 1907, 2227 T.S. No. 53 [hereinafter Hague Convention (IV)]; see also Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 64, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)].

17. Interpretation Order (West Bank Region), 5727-1967, No. 130, Sect. 8(a) (1967). This provision is redundant from an international legal perspective, since military enactments by definition override conflicting local law. A separate question, outside the scope of the present article,

In one of the early cases dealing with the legislative competence of the military government under Article 43 of the Hague Regulations, the HCJ ruled that the words "unless absolutely prevented" must be interpreted as referring not only to the military needs of the occupying army but also as imposing on the military government a duty to safeguard the economic and social interests of the population.<sup>18</sup> Subsequently, the subject matter of Israeli military enactments has greatly expanded beyond narrow military exigencies and the safety of Israeli forces.<sup>19</sup> Since 1967, military commanders have issued over 2,500 military enactments, in topics ranging from military, judiciary, and fiscal affairs, through welfare, health, and education, to import duties, postal laws, and the transportation of agricultural products.<sup>20</sup> Many military enactments regulating non-military affairs open with a declaration that they are "required for the benefit of the local population."<sup>21</sup> Among these military enactments, only a few (considered below) concern labor law.

The 1990s peace process made no change to the labor law regime in the West Bank. The 1995 Interim Agreement between Israel and the PLO on self-government in the West Bank and Gaza Strip transferred powers and responsibilities in the labor sphere to the Palestinian Authority, including regulation of, "*inter alia*, rights of workers, labor relations, labor conciliation, safety and hygiene in work places, labor accidents and compensation, vocational

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is the legal validity of a military enactment that does not respect the law in force even though the military commander is not 'absolutely prevented' from such respect.

18. HCJ 337/71 Almakdassa v. Minister of Defense 26(1) PD 574, ¶ 9 [1972] (Isr.) (authors' translation). This case concerned a military enactment amending the Jordanian Labor Law in order to enable the Military Commander to appoint members of an arbitration council for the resolution of labor disputes. The pre-existing Jordanian labor law required that the council be composed of representatives of employee organizations, but no such organizations existed. The HCJ confirmed the validity of the order in light of the military commander's authority to address the needs of the population. *But see id.* (Cohen, J. dissenting) (arguing that the occupant's duty is not to take up improvements which the former government failed to implement, at least not unless the resulting situation was intolerable). This minor labor dispute between a Palestinian employer and a Palestinian employee was the first time that the Israeli HCJ decided (implicitly, and without discussion) that it has jurisdiction to rule on issues taking place in the occupied territories. *See* Michael Sfard, *The Human Rights Lawyer's Existential Dilemma*, 38 ISR. L. REV. 154, 157 (2005). The Court did not consider Article 64 of the Fourth Geneva Convention, which increases the power—and the responsibility—of the occupying power. *See* EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 100–05 (1993) (reprint 2004).

19. All military enactments hold the same formal normative level. However, they are titled in a hierarchical fashion. Thus, there are "proclamations" and "orders" which are regarded as primary legislation, "regulations" that are secondary legislation, and notices that are of a lower order. In practice, there is a hierarchical significance to these designations. If a regulation conflicts with the authorizing "order," the order will prevail. In addition, the authority to issue regulations has been at time delegated to various officials in the military government, while the authority to issue orders remains with the Military Commander.

20. GORDON, *supra* note 2, at 27.

21. *See, e.g.*, Insurance of Motor Vehicles Order (Third Party Risk) (Temporary Provision) (West Bank Region), 5727-1967, No. 55 (Jordan); Order Regarding Using Pesticide on Olive Trees Against Olive Flies (Judea and Samaria), 5736-1975, No. 645 (Jordan).

and professional training courses, cooperative associations, professional work associations and trade unions, [and] heavy machinery equipment."<sup>22</sup> However, the Interim Agreement excludes Israeli settlements from the scope of its provisions. Thus, the transfer of powers and responsibilities to the Palestinian Authority does not extend in any way to the settlements.<sup>23</sup> In short, labor law in the West Bank remains regulated largely by Jordanian law.

When Israeli forces entered the West Bank in 1967, the Jordanian Labor Law of 1960 (as amended in 1965)<sup>24</sup> was in force in the region. In 1972, Justice Cohen noted that the Jordanian Labor Law Code "is an excellent and modern law, which merits that its authority and splendor be retained."<sup>25</sup> Perhaps for this reason, Israeli courts, which have generally demonstrated a preference for Israeli law in almost all private transactions between Israelis and Palestinian residents of the territories, exceptionally treated labor contracts between Israeli employers and Palestinian employees as governed by the local law of the territories, rather than by Israeli law.<sup>26</sup>

Through the years Jordanian labor law has been amended through military enactments with respect to work accidents,<sup>27</sup> sick pay,<sup>28</sup> compensation claims, and certain administrative issues.<sup>29</sup> Particularly noteworthy are the 1982 Order on Employment of Workers in Certain Places (Judea and Samaria) and its 2007 amendment. The 1982 order duplicated Israel's Minimum Wage Law to work for Israeli employers within the settlements.<sup>30</sup> The 2007 amendment extended the obligation to pay minimum wage to Israeli employers of Palestinian employees anywhere within the West Bank.<sup>31</sup>

Consistent with Justice Cohen's appreciation, some labor rights under

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22. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palest., annex III, appendix I, art. 21 Sept. 28, 1995, 36 I.L.M. 557 [hereinafter Israeli-Palestinian Interim Agreement].

23. *Id.* at art. XVII(1).

24. Labor Law (Judea and Samria), 5720-1960, No. 21, *amended by* Labor Law (Judea and Samaria), 5725-1965, No. 2 (Jordan) (and subsequent amendments).

25. *Almakadssa*, HCJ 337/71, 26(1) PD at 586 (Cohen, J. dissenting (but not on this point)).

26. BENVENISTI, *supra* note 18, at 134.

27. *See, e.g.*, Order Regarding Work Accident Insurance (Judea and Samaria), 5736-1976, No. 662 (Jordan); Order Regarding the Labor Law (Work Accidents) (Judea and Samaria), 5736-1976, No. 663 (Jordan); Labor Law (Judea and Samaria), 5720-1960, No. 21, *amended by* Labor Law (Judea and Samaria), 5725-1965, No. 2 (Jordan) (and subsequent amendments).

28. *See* Order Amending the Jordanian Labor Law No. 21 of 1960 (Amendment No. 6) (Judea and Samaria), 5745-1985, No. 1133 (Jordan).

29. *See* Order Amending the Jordanian Labor Law No. 21 of 1960 (Judea and Samaria), 5731-1971, No. 439 (Jordan); Order Amending the Jordanian Labor Law, Law No. 21 of 1960 (Amendment) (Judea and Samaria) 5740-1980, No. 825 (Jordan).

30. Order Regarding Employment of Workers in Certain Locations (Judea and Samaria), 5742-1982, No. 967, art. 3 (Jordan) [Hereinafter Order No. 967].

31. Order Regarding Employment of Workers in Certain Locations (Amendment No. 3) (Judea and Samaria) (No. 1605) 5788-2007. Nov. 7, 2007, article 6, adding Article 3B to Order No. 967 [hereinafter Order No. 1605].



Jordanian law, as enacted over fifty years ago and modified by the military commander, are comparable to those guaranteed under Israeli law in the early twenty-first century. The Attorney General, in a brief submitted to the NLC, listed similarities between the two legal regimes with respect to matters falling within the rubrics of maximum daily and weekly hour limit, minimum wage, sick pay, annual leave, protection of minors and women, severance pay, accident compensation, labor administration, and settlement of disputes. While in most instances Israeli law is more generous, in some contexts Jordanian law is more beneficial, such as sick pay.<sup>32</sup>

It should be noted, however, that the list submitted by the Attorney General is selective. It does not address various areas of labor law that are regulated under Israeli law but not under Jordanian law, including collective rights, such as the right to form unions, protection of unions and the right to strike—all of which are highly relevant to Palestinian employees' rights. While collective rights and collective agreements have governed the employment relations of the majority of employees in the Israeli labor force since soon after the establishment of the state in 1948,<sup>33</sup> no unions existed in the West Bank at that time.<sup>34</sup> Additionally, Jordanian law does not address, *inter alia*, leave to care for a sick family member, pay in lieu of annual leave, delay in payment of wages or of severance pay, equality at work, protection of employment for a pregnant employee, and protection against sexual harassment. Furthermore, rights enumerated under both regimes may have the same headings (e.g. working hours) but contain very different subsets (application, exemptions, sanctions, etc.), leading to a significant disparity between the two legal systems.<sup>35</sup>

A further complication arises with respect to apparently identical provisions that differ in implementation. For example, minimum wage in Israel is paid on either an hourly or monthly basis, while in the occupied territories, Palestinians' minimum wage is always paid on an hourly basis.<sup>36</sup> The latter implementation exempts employers from paying for time during which work is suspended even though the employees remain at their disposal (e.g., when

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32. See *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 16 (citing Attorney General's Brief (undated) (on file with the authors)).

33. GUY MUNDLAK, *FADING CORPORATISM* 62 (2008).

34. See *Almakdassa*, HCJ 337/71, 26(1) PD 574 (the military commander was ordered to staff the arbitration council, which was supposed to be composed of labor and employer unions, that had been inoperative under Jordanian rule, *inter alia*, because no such unions existed at the time). *But see* HCJ 507/85 *Tamimi v. Minister of Defense* 41(4) PD 57 [1987] (Isr.) (ruling that the military commander had to make the necessary arrangements for the establishment of a lawyers' union, even though no such union existed under Jordanian rule).

35. *E.g.*, under the heading of "Annual Leave," Israeli law allows cashing-in of annual leave pay if work terminates prior to the leave, while Jordanian law does not make a similar provision, even under the same heading. Brief of the Attorney General, *supra* note 32, at Appendix B.

36. *Minutes of the Knesset Standing Committee for the Assessment of the Problem of Migrant Workers* (July 3, 2007), at 15 (in Hebrew).

machinery breaks down).<sup>37</sup> Moreover, the formula for calculating minimum wage (extended in the occupied territories to all employees of Israelis) is the minimum monthly wage divided by the number of monthly working hours—186 under Israeli law, and 200 under Jordanian law.<sup>38</sup> This produces a significantly lower figure for a minimum hourly wage in the West Bank, despite the identical provisions under Israeli law and under the military enactment amending Jordanian law.

### *B. The Litigation: Worker's Hotline*

The origin of the *Worker's Hotline* case lies in five judgments of regional labor courts, which applied Israeli law to the labor relations between Palestinian residents of the West Bank and their Israeli employers in the settlements. In *Giv'at Ze'ev*,<sup>39</sup> the Jerusalem regional labor court ruled in favor of fourteen Palestinian cleaners, employed by the municipal council of Giv'at Ze'ev, who claimed minimum wage, pension, travel expenses, convalescence pay, holiday pay, severance pay, advance notice, and wage incentives, all under Israeli law. In *Abir Ltd.*, a Palestinian day employee of Abir Textile Industries Ltd., an Israeli firm located in the Barkan industrial zone, claimed advance notice, severance pay, compensation for delay in wages, pay in lieu of annual leave and minimum wage, all under Israeli law. The Tel-Aviv regional labor court ruled in favor of the employee and Abir filed an appeal of this decision.<sup>40</sup> In a similar case, *Aqua Print Ltd.*, a Palestinian working for Aqua Print Ltd., an Israeli company located in the Ma'ale Efraim industrial zone, demanded similar benefits after being dismissed. Again, the Tel-Aviv regional labor court ruled in his favor.<sup>41</sup> In *Tzarfati Car Services Ltd.*, a Palestinian employed by an Israeli garage located in the Ma'ale Adumim industrial zone, demanded severance pay and social benefits under Israeli law. The Jerusalem regional labor court rejected the employer's claim that Israeli labor law did not apply.<sup>42</sup> Lastly, in *Nituv Management and Development Ltd.* the Tel-Aviv labor court denied a request for summary dismissal filed by the respondent company, which was based on the claim that the Israeli Severance Compensation Act (1963) did not apply to a Palestinian employee.<sup>43</sup>

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37. See HUGH COLLINS, KEITH D. EWING & AILEEN MCCOLGAN, *LABOUR LAW: TEXT AND MATERIALS* 378–79, 460 (2001).

38. Order Regarding Employment of Workers in Certain Locations (Judea and Samaria), 5742-1982, No. 967, art. 3 (Jordan); Order Regarding Employment of Workers in Certain Locations (Amendment 3) (Judea and Samaria), 5788-2007, No. 1605 (Jordan) (amending No. 967).

39. Labor Ct. 55/3-100 to 55/3-113 *Giv'at Ze'ev* (1997), Nevo Legal Database (by subscription) (Isr.).

40. Labor Ct. 57/3-2981 *Abir Ltd.* (1997), Nevo Legal Database (by subscription) (Isr.).

41. Labor Ct. 300309/99 *Aqua Print Ltd.* (2001), Nevo Legal Database (by subscription) (Isr.).

42. Labor Ct. 1097/99 *Tzarfati Car Services* (Sept. 11, 2000), Nevo Legal Database (by subscription) (Isr.).

43. Labor Ct. 35/3400 *Nituv Mgmt. and Dev.* (1998), Nevo Legal Database (by subscription)

Even this cursory overview reveals several important commonalities among the cases. First, they all involve Palestinian employees and Israeli employers. Second, the employees demanded minimum rights according to Israel statutory labor law. No claim was made regarding benefits arising from applicable collective agreements. Third, all the claims were accepted by regional courts. Amidst these commonalities, it should be noted that while four of the employers' appeals to the NLC involved Israeli companies from the private sector, situated in the West Bank, one appeal (*Giv'at Ze'ev*) involved a public sector employer (a municipality).

The employers in the five cases appealed to the NLC. The NLC chose to deal jointly with the substantive legal question that all the cases have in common: does Israeli labor law apply to the employment of Palestinians within a settlement in the West Bank by an Israeli corporation or public employer?<sup>44</sup>

Under the Israeli choice of law doctrine, which draws on the common law, the law governing a contract is primarily that which the parties have chosen. Thus, an express stipulation on the matter will usually be given effect by the court. If the parties have not chosen a law, the court must identify the law to which the contract is most closely connected.<sup>45</sup>

The NLC noted that in none of the cases were there written contacts or express stipulations of the applicable law.<sup>46</sup> It therefore followed the traditional, contact-based approach in order to identify the law to which the contracts were most closely connected, reversing the regional labor courts' judgments. The NLC started with the presumption that the contract is governed first and foremost by the law of the place of performance,<sup>47</sup> and then examined whether there was a country other than Jordan to which the contract was more closely connected under a weighted contact count, namely one which attaches different weight to various contacts.<sup>48</sup> The Court drew on the 1980 Rome Convention on the Law Applicable to Contractual Obligations (the "Rome Convention"),<sup>49</sup> and specifically Article 6(2) governing "Individual Employment Contracts." Article 6(2)(a) provides:

(a) . . . a contract of employment shall, in the absence of choice [by the parties], be governed by the law of the country in which the employee habitually carries

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(Isr.).

44. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98.

45. *Worker's Hotline*, HCJ 5666/03 at ¶14 (quoting CA 419/71 *Menora Liability and Secondary Insurance Co. Ltd v. Nomikos* 26(2) PD 527, 531 [1972] (Isr.)). See also Council Convention on the Law Applicable to Contractual Obligations 80/934, art. 4(1), 1980 O.J. (L 266) 1. [hereinafter Rome Convention]; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §88 (1971).

46. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 21.

47. See *Worker's Hotline*, HCJ 5666/03 at ¶ 14; *Menora*, CA 419/71, 26(2) PD at 531; Rome Convention, *supra* note 45, at arts. 4(1), 6(2); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 45, § 188(2)(c).

48. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 24.

49. See Rome Convention, *supra* note 45, at art. 4(1); Consolidated Version of the Convention on the Law Applicable to Contractual Obligations, Jan. 6, 1998, 1998 O.J. (C027) 34.

out his work in performance of the contract . . . unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.<sup>50</sup>

The NLC noted that the specific contacts to Israeli law were the identity of the employer, the currency of payment, the language of documents, the adherence to Israeli days of rest, and even the payment of tax in Israel. None of these, the court found, were indicative of the applicable law.<sup>51</sup> In contrast, the contacts to Jordanian law included the facts that the contracts were performed in the West Bank, which was also the place of contracting; the place of business of the employer was the West Bank;<sup>52</sup> and the employees were Palestinian residents of the West Bank.<sup>53</sup> On this basis, the NLC concluded that the contracts were more closely connected to Jordanian law.<sup>54</sup> It then added that public policy considerations may require completion of "gaps" in a contract governed by foreign law, with "certain Israeli rules that reflect universal norms applied by civilized nations acting under international standards to provide employees with reasonable protection."<sup>55</sup> These rules would include the right to weekly rest, minimum pay, gender equality, and more.<sup>56</sup>

Among the factors determining whether such completion was required as a matter of public policy, the Court pointed out that, in practice, Israeli and Jordanian law are very similar.<sup>57</sup> The NLC noted that not only have Israeli labor norms been incorporated into the law of the territory,<sup>58</sup> but that under normal conditions, Palestinian residents of the West Bank work both in Israel and in the West Bank for both public and private Israeli employers. Accordingly, the NLC found that there was "no justification for significant differences between the two systems,"<sup>59</sup> implying that there was no public policy consideration that justified the substitution of Jordanian law with Israeli law.<sup>60</sup> The Court's consideration of

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50. Rome Convention, *supra* note 45, at arts. 6(2).

51. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 29.

52. A contact that largely duplicates the former.

53. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 30.

54. *Id.* at ¶ 31.

55. *Id.* at ¶ 35.

56. *Id.*

57. *Id.* at ¶ 36(d).

58. The Court did not clarify which norms or how they had been incorporated in the law of the West Bank, but may have been referring to Order No. 967 and Order No. 1605, which apply Israeli minimum wage in the settlements and to Israeli employers throughout the West Bank. See Order Regarding Employment of Workers in Certain Locations (Amendment 3) (Judea and Samaria), 5788-2007, No. 1605 (Jordan); Order Regarding Employment of Workers in Certain Locations (Amendment 3) (Judea and Samaria), 5788-2007, No. 1605 (Jordan) (adding art. 3B to Order No. 967).

59. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 36(g). It is not clear whether the Court made a normative or a factual finding.

60. One might note that the notion of using of public policy not to reject the application of foreign law but to apply the law of the forum is exceptional.

the characteristics of the labor market<sup>61</sup> drew upon public interests, namely the needs of the economic organization of both Israel and the West Bank. The Court then noted that since Israelis are employed in the settlements under Israeli law, *prima facie* different terms of employment for Israelis and Palestinians would be discriminatory and prohibited. This prohibition would stem either from administrative legal principles (applicable to public employers) or from the obligation of good faith, which entails equal treatment of employees (applicable also to private employers). In any case, any claim of discrimination, like the question of public policy, should be determined by the lower courts.<sup>62</sup>

The NLC's analysis is a straightforward but inaccurate application of the European approach reflected in the Rome Convention. For one, the NLC examined each of the contacts separately, rather than together under a weighted count. Correctly pointing out that none of the contacts (e.g., the identity of the employer, the currency used, the language of documents, and even the incorporation of the provision of Israeli law regarding days of rest on Jewish holidays) would alone establish that a contract is more closely connected to Israel, the Court failed to take into account the cumulative effect of the numerous contacts, which may lead to a different conclusion. Furthermore, when examining the individual contacts, the Court merely noted that none of them indicated that Israeli law governed the contract. That, however, is not the question. The question is whether these contacts (together, or according to the Court, individually) create a strong enough connection to Israel to rebut the presumption that the law of the place of performance governs the contract. The NLC's failure to consider the cumulative effect of the numerous contacts to Israeli law, combined with its rejection of weighing each contact, could indicate that the only circumstance in which the presumption would have been rebutted is if the parties had expressly stipulated the applicable law. In that case, the entire interpretative exercise would not have been necessary.<sup>63</sup>

The NLC noted that the presumption that the contract is governed by the law of the place of performance aims, *inter alia*, to protect migrant employees from exploitation by prohibiting employers in wealthier countries from shirking their responsibilities under their home country's law.<sup>64</sup> The NLC acknowledged

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61. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 36(7).

62. *Id.* at ¶ 44. Recourse to public policy to ensure equality is only necessary with respect to the private employers. The municipal council is the arm of the military commander, who, as a public authority under Israeli law, is prohibited by Israeli administrative law from discriminating among employees. *Id.* at ¶ 43. See also H CJ 663/78 Kiryat Arba Adm. v. Nat'l Labor Ct. 33(2) PD 398, 403-04 [1979] (Isr.).

63. On the contact count approach under Israeli law, see Rhona Schuz, *On the 'Closest Connection' Approach in Israeli Private International Law*, 4 MOZNEI MISHPAT 349 (2005) (in Hebrew).

64. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 25. See also CivilC 83875/95 (TA) CivilC (TA) 83875/95 Muhamada v. Yehoshua and Menora (1998) Nevo Legal Database (by subscription) (unpublished) (in Hebrew) (Isr.).

that in the present case, such protection was irrelevant.<sup>65</sup> Indeed, the issue was not cross-border movement of employees, but rather the cross-border movement of employers. As one employer candidly argued, some private businesses relocate to the West Bank in order to benefit from the lower standard of living, the captive market, and water and land resources.<sup>66</sup> When the situation is one of international outsourcing, protection of the weaker party is guided by principles different to those reflected in the Rome Convention. This could have led the NLC to reject the presumption in the Rome Convention as a guide, or at least to diminish its relative weight.

Worker's Hotline, an Israeli NGO, appealed the NLC's judgment before the HCJ. The HCJ affirmed the NLC's holding that the appropriate choice of law method with respect to contracts is that contracts count. However, it rejected the dominance of a single territorial link in determining the law governing the contract. It first pointed out that both the Rome Convention and the U.S. Restatement of the Law (Second) Conflict of Laws, 1971 ("Second Restatement") call for an overall weighted evaluation of contacts with respect to each specific provision of a contract.<sup>67</sup> The court noted (inaccurately) that only the European system contains a presumption that the law of the place of performance is applicable to employment contracts.<sup>68</sup> The Court then emphasized that, to ensure a just outcome, a choice of law determination must take into account national and international public interests as well as personal interests. Where labor relations are concerned, particular weight should be given to the public, non-derogable content of rules<sup>69</sup> that address the power disparities between employer and employee.<sup>70</sup> This, the HCJ stated, is also the approach of the European and US systems.<sup>71</sup> Furthermore, where concrete contacts are absent, the court may rely on objective ones, such as the law applicable to

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65. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 25(d).

66. *Worker's Hotline*, HCJ 5666/03 at ¶ 10. *Nituv Management and Development* argued that employers who had moved their business to the West Bank had relied on lower production costs, based on the applicability of Jordanian law. See *Nituv Mgmt. and Dev.*, Labor Ct. (BS) 35/3400; SHIR HEVER, *THE POLITICAL ECONOMY OF ISRAEL'S OCCUPATION—REPRESSION BEYOND EXPLOITATION* 62 (2010). In 2001, Shimshon Bichler and Jonathan Nitzan estimated the economic value of the reliance on Palestinian labor at approximately 10 percent of Israel's GDP. See SHIMSHON BICHLER & JONATHAN NITZAN, *FROM WAR PROFITS TO PEACE DIVIDEND* 178 (2001) (in Hebrew).

67. *Worker's Hotline*, HCJ 5666/03 at ¶¶ 13–15.

68. *Id.* at ¶ 19. The U.S. Restatement includes the place of performance as a potential contact, noting also that if the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 45, at § 188(3).

69. *Worker's Hotline*, HCJ 5666/03 at ¶ 17.

70. *Id.* at ¶ 21. This was the last mention of these power disparities in the judgment.

71. *Id.* at ¶ 22. This statement is inaccurate with respect to the European approach, where mandatory rules of both kinds do not play a role in determining the proper law of the contract but only mitigate its effects where necessary.

similar contracts, between similar parties, in similar circumstances.<sup>72</sup>

With respect to the case at hand, the Court opined that since there is no single uniform legal system applicable in the settlements, the link between the employment relations and the West Bank law as the law of the place of negotiation and performance was particularly weak. Thus, the Court reasoned that in this situation the ordinary expectation that territorial law would apply is diminished, while other contacts gain importance, such as the currency, language of documents, days of rest, and even payment of tax in Israel in one instance (all of which were also noted by the NLC but not attributed much importance). The Court concluded that the labor relations of the Palestinian employees in the settlements were more closely connected to Israeli law than to Jordan and its law.<sup>73</sup>

The Court then added that its conclusion was supported by the guiding principles of labor law, which call for a choice of law that would ensure equality between employees carrying out equivalent work<sup>74</sup> without distinction based on ethnicity or nationality.<sup>75</sup> According to the Court, since Palestinians are employed in Israel under Israeli law, and since Israelis are employed in the settlements under Israeli law (a fact which is only implied in the HCJ judgment and mentioned briefly in the NLC's ruling), equality requires that Palestinians in the settlements should also be employed under Israeli law.<sup>76</sup> The Court's analysis nonetheless disregards the fact that the choice of the place of performance as a connecting factor is itself a rule that aims, *inter alia*, to ensure equality between employees. In other words, the obstacle to equality among employees is not presented by the choice of law rule, but rather by the non-uniformity of the law that applies within the West Bank.

Finally, in a concurring opinion, Judge Jubran stressed Israeli law's prohibition of discrimination on ethnic or national grounds, as well as the international human right to equality in employment under ILO Convention Article 111 and the Universal Declaration of Human Rights.<sup>77</sup> Judge Jubran added that Israeli law should prevail over Jordanian law also because it is more protective of employees.<sup>78</sup> His opinion concluded that, "in practice, the Israeli exclaves are legally Israeli villages, at least with respect to the Israeli law and

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72. *Id.* at ¶ 18.

73. *Id.* at ¶¶ 25-26.

74. *Id.* at ¶ 26.

75. *Id.* at ¶ 21.

76. *Id.* at ¶ 26.

77. *Id.* at ¶ 3 (Jubran, J. concurring). See generally, International Labor Organization, Discrimination (Employment and Occupation) Convention, July 5, 1958, I.L.O. No. 111, 362 U.N.T.S. 31; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), 71 (Dec. 10, 1948).

78. *Worker's Hotline*, HCJ 5666/03 at ¶ 10 (Jubran, J. concurring). On the 'better rule of law' doctrine as a means of resolving conflicts of law under U.S. law, see ROBERT A. LEFLAR, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587-88 (1996).

specifically labor law.”<sup>79</sup> Since the Israeli employees in the enclaves are governed by Israeli law, Palestinian employees should also be governed by Israeli law.<sup>80</sup>

In sum, the HCJ’s ruling is based on three tiers:

1. The place of performance should not be overstated as a contact for a choice of law determination in contracts, neither in general nor in specific circumstances.
2. A weighted contacts count links the contracts most closely to Israeli law.
3. As a matter of legal policy, equality between employees requires that *identical law* apply to all employees, therefore Israeli law must apply also to labor relations between the Palestinian employees and their Israeli employers.

The HCJ’s opinion leans heavily on policy analysis, a characteristic of the US approach (in contrast to the NLC’s European approach). It differs from that of the NLC in two main respects. First, it attached different weight and significance to place of performance, leading to a diametrically opposite result of the NLC in the weighted contacts count. Second, while the NLC regarded equality between employees as no more than a potential public policy qualification to the application of the foreign law identified as the most closely related to the contract, the HCJ regarded such equality as an element in determining the choice of law rule itself. These different approaches as to the choice of law analysis have important ramifications in other areas of law that have barely been addressed by the Courts, namely public international law and labor law. These are explored in Part IV.

### *C. The Aftermath of Worker’s Hotline*

Before widening the perspective of the analysis, however, it is important to highlight the judgment’s practical consequences. The goal of the HCJ, admirable as it was, can, and has been, easily frustrated. As Cass Sunstein notes, “[b]ecause rules have clear edges, they allow people to ‘evade’ them by engaging in conduct that is technically exempted but that creates the same or analogous harms.”<sup>81</sup> As often happens in law and in employment law in particular, individuals and corporations react to the new rules by redesigning their conduct in a manner that preserves the economic structure and the power relations that the law intended to prohibit. Thus, the HCJ’s *Worker’s Hotline* ruling not only identified the justification for subjecting an employment relationship in the settlements to Israeli law under choice of law rules, but also, perhaps inadvertently, offered guidelines for the exemption of employment

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79. *Worker’s Hotline*, HCJ 5666/03 at ¶11 (Jubran, J. concurring) (author’s translation).

80. *Id.*

81. Cass Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 995 (1995). See also Yuval Feldman, *Ex Ante vs. Ex-Post: Optimizing State Intervention in Exploitive Triangular Employment Relationships*, 30 COMP. LAB. L. & POL’Y J. 751 (2009).



relationships from Israeli law. An Israeli employer may abide by *Worker's Hotline* and still manage to avoid the reach of Israeli law in two different fashions, both of which have already been put into practice.

One way in which an employer can stay true to the letter of *Worker's Hotline* yet circumvent its spirit is by entering into an express agreement with the employee on the issue of applicable law. In the HCJ's judgment as well as in subsequent rulings, the courts clarify that the legal analysis, which includes a choice of law determination (e.g., the contact count) and substantive legal principles (e.g., equality), is necessary because the parties did not agree on the applicable law. As could well have been expected, since the *Worker's Hotline* ruling, Israeli employers have drafted new contracts with their Palestinian employees stipulating that Jordanian law will govern the employment relationship.<sup>82</sup> The validity and weight of these provisions has yet to be assessed by the courts. In particular, the courts will have to flesh out the principle that, barring exceptional circumstances,<sup>83</sup> the court will give effect to an express agreement by the parties regarding the law governing the contract.<sup>84</sup> In labor law employees' consent to waive their rights is met with suspicion (if not dismissal) in light of the existing power disparities,<sup>85</sup> such that waiver provisions are suspect even if they purport to address the applicable legal system rather than substantive law.<sup>86</sup> Such a waiver is analogous to employees' 'consent' to waive an entire bundle of rights, such as that associated with their status as employees.<sup>87</sup> Since employee status is the origin of an array of rights, it is ludicrous to suggest that although employees may not waive specific rights (e.g., minimum wage), they may waive their status as employees, which provides the basis for those rights. Along the same lines, the power disparities between employer and employee mean that suspicion should attach to an employee's consent (e.g., through a choice of law stipulation) to an employment

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82. See, e.g., Labor Ct. (Jer.) 3452/09 Jahalin v. Municipality of Ma'ale Adumim (2011), Nevo Legal Database (by subscription) (unpublished) (Isr.). See also E-mail from Gilad Noam, Attorney, to author (May 1, 2011) (on file with authors).

83. In Labor Appeal, the NLC ruled that the agreement between two Israelis, signed in Israel, according to which Cyprus law would apply should not be respected. LaborA (Jer.) 418/06 Nehushtan v. Classica Int'l (2011), Nevo Legal Database (by subscription) (Isr.). According to the NLC, foreign law should apply only where there is true and informed consent, that includes familiarity with the law chosen. *Id.* In the relevant case, the NLC concluded that the sole reason for the purported application of Cyprus law was to avoid Israeli tax law. *Id.*

84. *Worker's Hotline*, HCJ 5666/03 at ¶ 23

85. PAUL DAVIES & MARK FREEDLAND, *KAHN-FREUND'S LABOUR AND THE LAW* 25–26 (3rd ed. 1983).

86. Fausto Pocar, *La protection de la partie faible en droit international privé*, COLLECTED COURSES OF THE HAGUE ACADEMY OF INT'L L. 188, 356 (1984); PETER NYGH, *AUTONOMY IN INTERNATIONAL CONTRACTS* 141–43 (1999). See, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003).

87. KEITH W. WEDDERBURN, *THE WORKER AND THE LAW* 53–55 (1966). See *Young & Woods Ltd. v. West*, [1980] I.R.L.R.(CA) (Eng.) and the discussion in COLLINS, EWING & MCCOLGAN, *supra* note 36, at 546–48.

relationship under a legal structure that is less beneficial than the structure that would otherwise apply. Admittedly, since Jordanian law does have a real connection with the contract, under general choice of law doctrine, a choice of Jordanian law as that governing the contract would not be regarded, *prima facie*, as unreasonable or in bad faith.<sup>88</sup> Nonetheless, the particular context in which the matter arises (i.e., labor law) requires a more cautious approach. If the contact count is perceived as leading unambiguously to Israeli law, any other choice would be suspect as an attempt to circumvent protective rules.

Employers seeking to avoid the application of Israeli law to an employment relationship with Palestinian employees also frequently use manpower agencies and service providers, a highly prevalent technique in the Israeli labor market.<sup>89</sup> These firms are often used only for 'payrolling' purposes, creating the appearance that the agency or service provider is the legal employer, and thus allowing the true employer to circumvent obligations that would govern a direct employment relationship based in collective agreements.<sup>90</sup> The organization of work through chain suppliers rather than a single firm may establish conditions for potential injustice.<sup>91</sup> In the context of choice of law, using an intermediary Palestinian company as a service provider or manpower agency to hire Palestinian employees may enable an Israeli employer to deliberately manipulate the contact count away from Israeli law. NGOs have begun to collect evidence of this practice,<sup>92</sup> and one variant of such an arrangement has already reached the courts: following a public tender, the Civil Administration contracted a Palestinian employer to provide services in the Beitunya crossing between Israel and the West Bank. One of the Israeli companies competing for the tender, Dynamica 2002 Ltd., petitioned the HCJ, claiming that, following *Worker's Hotline*, the winning offer should not have been considered since it relied on a pay structure (minimum wage and benefits) that was illegal under Israeli law.<sup>93</sup> The Civil Administration argued that a significant difference underlay the two cases: while *Worker's Hotline* involved an Israeli employer,

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88. Contrast with NYGH, *supra* note 86, at 140.

89. Guy Mundlak, *The Israeli System of Labor Law: Sources and Form*, 30 COMP. LAB. L. & POL'Y J. 159, 175 (2009); Guy Davidov, *Enforcement Problems in 'Informal' Labor Markets: A View from Israel*, 27 COMP. LAB. L. & POL'Y J. 3, 10 (2005).

90. See generally Judy Fudge, *The Legal Boundaries of the Employer, Precarious Work and Labour Protection*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW 295 (Guy Davidov & Brian Langille eds., 2006); Simon Deakin, *The Changing Concept of Employer in Labour Law*, 30 INDUSTRIAL L. J. 72 (2001); Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OX. J. LEGAL STUD. 353 (1990); ALAN SUPLOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 17–22 (2001).

91. Hugh Collins, *Ascription of Legal Responsibility to Groups in Common Patterns of Economic Integration*, 53 MODERN L. REV. 731, 736 (1990).

92. Kav LaOved, *Palestinian Workers in West Bank Settlements – 2008*, KAV LAOVED, (June, 20 2009), [http://www.kavlaoved.org.il/media-view\\_eng.asp?id=2356](http://www.kavlaoved.org.il/media-view_eng.asp?id=2356).

93. HCJ 1234/10 Dynamica 2002 Ltd. v. Civil Adm., July 10, 2010, ¶ 12 (July 10, 2010), Nevo Legal Database (by subscription) (Isr.).

the case at hand concerned a Palestinian employer who was not bound by Israeli law. The HCJ was not provided with information as to the content of the contracts between the Palestinian employer and his employees. Proceeding on the assumption that there was no express agreement between the parties to apply Israeli law, it applied the contact count to determine which law should apply. The Court accepted the importance of the employer's identity as a determining factor in this count, and added that no contacts to the contrary (e.g., use of Hebrew as the language of the contracts, use of Israeli currency for payment, reliance on Jewish holidays as days of rest, etc.) had been proven. The Court concluded that the contract's *only* contact with Israeli law was the fact that the Civil Administration ordered the work. According to the Court, this contact was not sufficient for the application of Israeli law. The court therefore confirmed the validity of the Jordanian law-based offer.<sup>94</sup>

The obvious conclusion from this recent judgment is that unless courts look at apparently innocuous agreements in context, Israeli employers can abide by the dictates of *Worker's Hotline* and still offer their employees terms that are only acceptable under Jordanian law, simply by incorporating a Palestinian company as an intermediary.<sup>95</sup>

The principle of equality between Israeli and Palestinian employees is also easy to circumvent. For example, in *Dynamica* the Court reiterated the *Worker's Hotline* conclusion that Israeli and Palestinian workers may not work under different laws, but found that "unlike the situation in *Worker's Hotline*, where Palestinian and Israeli workers were employed together, here *only Palestinian workers* are involved."<sup>96</sup> Consequently, applying Jordanian law to the contracts of the Palestinian employees was not discriminatory.<sup>97</sup>

Finally, it is possible to distinguish the terms of employment along national divides through legislation. In a case brought before the Be'er-Sheva Regional Labor Court, eighty-four Palestinians who had been employed in the Erez Industrial Zone (EIZ) brought claims against their Israeli employers for severance pay under Israeli law.<sup>98</sup> The EIZ is not a municipality inhabited and governed by Israeli citizens, but a territory controlled by the Israeli military. In one of the first cases to rely on the HCJ ruling in *Worker's Hotline*, the Regional Labor Court accepted the claim for severance pay.<sup>99</sup> The Court acknowledged that Israeli businesses had "flocked" to the EIZ over a period of thirty-six years

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94. *Id.*

95. On the use of contact factors that are vulnerable to manipulation by one party, see Wilhelm Wengler, *The Significance of the Principle of Equality in the Conflict of Laws*, 28 L. & CONT. PROBLEMS 822, 831-32 (1963).

96. *Dynamica 2002 Ltd.*, HCJ 1234/10 at ¶ 12.

97. *Id.*

98. Labor Ct. (BS) 2142/06 Ashkantana v. Az-Rom (2008), Nevo Legal Database (by subscription) (Isr.).

99. *Id.*

to enjoy the advantages of cheap labor.<sup>100</sup> Yet, arguably, this was not sufficient a reason for the Court to conclude that the parties "agreed" to apply the territorial law (in this case, Egyptian law) to their contracts. On appeal, the NLC confirmed the application of Israeli law to the case at hand, but ruled that the Disengagement Plan (according to which Israeli settlements in the Gaza Strip have been dismantled and their residents removed into Israeli territory) should be viewed as a frustration of the employment contracts, exempting the employer from the obligation to pay severance to the Palestinian employees.<sup>101</sup> At the same time, an inquiry into the rights of Israeli employees in the EIZ reveals that the Law for the Implementation of the Disengagement Plan (2005) states, *inter alia*, that Israeli employees who work in factories located in the Gaza Strip area, and who have lost their place of employment following the disengagement plan, are entitled to "adaptation" payments.<sup>102</sup> Somewhat surprisingly, only Justice Rosenfeld, the dissenting judge in the NLC, raised the matter of discrimination between Israeli and Palestinian employees. She stated, "although it is true that the [d]isengagement law refers only to Israeli workers, while here we are concerned with Palestinian workers, it is unthinkable to distinguish between an Israeli and a non-Israeli worker when applying the legal definition of the end of the employment relationship."<sup>103</sup> Apparently, it *is* thinkable, as the majority did not address the issue at all.

We find that various courts' efforts to ascertain the rights of Palestinians who work for Israeli employers have led to a very unsatisfactory result. The reason for this result is that the courts have approached the entitlement to certain employees' rights as a choice-of-law question. The situation is further complicated because Israeli employers in the West Bank are "repeat players"<sup>104</sup> that can (and arguably do) adjust their behavior according to judicial signals. To deal with this problem, we propose an alternative analysis, outside the choice of law issue. The substantive quandary stems from the fact that Israel controls areas in the West Bank; public and private Israeli employers employ Israelis and Palestinians in that area; and Israelis are entitled to a bundle of employment rights as if they were living in Israel. The question before us is whether this factual background calls for the conclusion that Palestinian employees should *also* be entitled to employment rights as if they were living in Israel. We continue our discussion by inquiring why Israelis working in the occupied territories are entitled to the same rights they would have if they were living in

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100. *Id.* at ¶ 23.

101. The Court mentioned that over 1,000 Palestinian employees were already engaged in legal disputes against their former Israeli employers for severance pay following the disengagement. LaborA 256/08 *Koka v. Schwartz* ¶ 25 (2001), Nevo Legal Database (by subscription) (Isr.).

102. Law for the Implementation of the Disengagement Plan, 5795-2005 S.H. No. 1982 p. 142 sects. 49, 60 (Isr.).

103. *Koka*, LaborA 256/08 at ¶ 24 (Rosenfeld, J.).

104. Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC. REV. 95 (1974).

Israel. Then we examine the implications of this entitlement for Palestinians working for Israeli employers.

### III.

#### FEELING AT HOME: WHY ARE ISRAELIS IN THE WEST BANK SUBJECT TO ISRAELI LAW?

There is a commonplace perception within Israel society (and beyond it) that Israeli settlers live in the settlements under Israeli law. In order to understand the source and implications of this perception, it is necessary to explicate the law applicable in the settlements.

The HCJ's starting point in *Worker's Hotline* was that the legal regime applicable in the West Bank is the law of occupation.<sup>105</sup> Under the law of occupation, local law that was in force prior to the occupation remains binding, unless it is amended by enactments of the military commander.<sup>106</sup>

However, with respect to Israeli residents of the West Bank, there are four additional layers, commonly referred to as the 'law of the exclaves.' The Court only referred to two. The first layer consists of military enactments that duplicate a select body of Israeli legislation to the settlements' territory.<sup>107</sup> The other layer is Israeli legislation that applies to Israeli residents in the West Bank on a personal basis.<sup>108</sup> The purpose of these two layers of norms is to enable Israelis moving to the settlements to maintain their lifestyle as if they continued to live under Israeli sovereignty and law, despite the different legal regime to which they become formally subject. Consequently, the settlements have become exclaves where Israeli law applies, connecting them legally, economically, and socially to Israel.<sup>109</sup> The remaining two layers of norms make the legal regime applicable to settlers appear identical to Israeli law. One is comprised of collective agreements that govern the employment of Israeli employees in the occupied territories. The other is the consensual application of

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105. In the past there was much dispute whether the West Bank and the Gaza Strip were occupied territories in terms of the Fourth Geneva Convention. Israel contended that they were not, since Jordan had no sovereign title to the territory. However, at no time did Israel claim that the West Bank was under Israeli sovereignty, nor was it ever disputed that it was an occupied territory within the terms of the 1907 Hague Regulations. Furthermore, from the early 1970s, Israel has undertaken to act in accordance with the humanitarian provisions of the Fourth Geneva Convention. In recent years, it has largely stopped arguing the *de jure* inapplicability of the Fourth Geneva Convention. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 198 (2002).

106. Hague Convention (IV), *supra* note 16, at art. 43.

107. See Order on Administration of Municipal Councils (Judea and Samaria) 1981, No. 892 (Isr.); *Worker's Hotline*, HCJ 5666/03 at ¶ 11.

108. Law for the Extension of the Emergency Regulations (Judea and Samaria—Criminal Adjudication and Judicial Assistance), 5767-1967 S.H. 517, art. 6B and the Annex at p. 20 (Isr.) (as extended and amended).

109. BENVENISTI, *supra* note 18 at 135.

Israeli law when an Israeli employer contracts with an Israeli employee in the settlements. These two layers, given the courts' failure to consider their unique relevance to the predicament facing Palestinian employees, merit special notice. The following sections consider each of the four avenues in greater detail, with particular reference to labor law.

*A. The Military Commander's Enactments: The Municipal Councils' Code*

In 1981, the Military Commander established the regional and municipal councils in the West Bank. The Order on Administration of Municipal Councils (Judea and Samaria) (No. 892) (1981) provides:

The IDF commander in the region may set in the Code rules for the administration of municipal councils and regarding powers and administrative arrangements concerning the affairs of council residents.<sup>110</sup>

The Military Commander subsequently enacted the Code of the Municipal Councils.<sup>111</sup> This Code, a military enactment, duplicates a host of Israeli primary and secondary legislation to the territory of the settlements (which are defined as municipal councils for the purpose of the Order). When Israeli legislation is amended, the Code is correspondingly amended.<sup>112</sup> Indeed, Justice Rivlin quotes Amnon Rubinstein, who pointed out, "a resident of Maale-Adumim [settlement], for example, is putatively subject to military rule and the local Jordanian law, but actually lives according to Israeli laws with respect to his personal law and with respect to the local authority where he lives. The military government is nothing but a sign, through which the Israeli law and administration operate."<sup>113</sup>

The Code provides that "rights, duties, authorities and sanctions provided by the laws incorporated in the Code will apply *mutatis mutandis* as if they were provided by the Code, but they will not govern a resident of the settlements with respect to a person who is not a resident, unless otherwise stipulated by the annexes."<sup>114</sup> The effect of this provision is that the enforcement of obligations under the laws in the Code is only possible against a resident of the settlements

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110. Order on Administration of Municipal Councils (Judea and Samaria), 5741-1981, No. 892 (Isr.). See also Order on Administration of Regional Councils, 5739-1979, No. 783 (Isr.).

111. Order on Administration of Municipal Councils (Judea and Samaria), 5741-1981, No. 892 (Isr.).

112. The Order concerning Administration of Municipal Councils (Judea and Samaria) (Amendment No. 4) allows the extension of the settlements' regime to areas outside them. See Order Concerning Administration of Municipal Councils (Judea and Samaria) (Amendment No. 4), 5767-1997 No. 1453 (Isr.). This order enables extension of the 'enclave law' to the industrial areas adjacent to the settlements. *Id.*

113. *Worker's Hotline*, HCJ 5666/03 at ¶ 11 (quoting Amnon Rubinstein, *The Changing Character of the "Territories": from Trust to a Legal Hybrid*, 11 IYUNEI MISHPAT 439 (1986) (in Hebrew)).

114. Order on Administration of Municipal Councils (Judea and Samaria) 1981, No. 892, art. 140 (B) (Isr.).

with respect to conduct towards other residents of the settlements, but not, for example, with respect to conduct towards Palestinians. Moreover, although the wording of this provision limits only enforcement of laws, it has been interpreted as limiting also the substantive content of the laws incorporated in the Code, so that the Code only benefits residents of the settlements (who are invariably Israeli nationals or registered residents). In short, the Code applies Israeli legislation (listed in the annexes) only in the settlements and only with respect to Israeli residents of the settlements.<sup>115</sup>

Annex 6 of the Code, entitled "Labor Law," incorporates the following Israeli legislation: Minimum Wage Law, 1987;<sup>116</sup> the Employment Service Law, 1959;<sup>117</sup> the Foreign Workers Law, 1991;<sup>118</sup> the Emergency Labor Law, 1967;<sup>119</sup> cost of living allowance extension orders; those sections of the Collective Agreements Law, 1957, that are necessary for the application of extension orders to the settlements; Emergency Work Service, 1967; Foreign Workers Law, 1991; and secondary legislation authorized by these laws.<sup>120</sup>

In *Givat Ze'ev* the NLC pointed out that the laws incorporated in the Code are not relevant to the case at hand.<sup>121</sup> The HCJ only alluded to the Code when it mentioned "military enactments applicable only to the settlements."<sup>122</sup> However, the norms incorporated by the Code, such as enforcement mechanisms in the Minimum Wage Law, distinguish their beneficiaries not only on the basis of territory but also on an individual basis, since the Code is exclusive to Israeli residents in the settlements. Neither court considered it necessary to examine the legality of a legal instrument that applies in this discriminatory manner. It is worth noting that Israeli labor law does not generally differentiate between

115. *Id.*; Communication with Ariel Yosefi, Office of the Legal Advisor for Judea and Samaria, Military Advocate General's Office, Dec. 8, 2008.

116. The Municipal Councils Code applies the Israeli Minimum Wage Law 5748-1987, S.H. 1211, p. 68 to the benefit of Israeli residents of the settlements only. *See* Order on Administration of Municipal Councils (Judea and Samaria) 5741-1981, No. 892 (Isr.). Order No. 967, discussed above, extended the benefit of minimum wage to Palestinian employees of Israelis within the settlements. *See* Order Regarding Employment of Workers in Certain Locations (Judea and Samaria), 5742-1982, No. 967, Art. 3 (Jordan). Order 1605, extends this benefit to employees of any Israeli employer within the West Bank. *See* Order Regarding Employment of Workers in Certain Locations (Amendment 3) (Judea and Samaria), 5788-2007, No. 1605 (Jordan) (adding Art. 3B to Order No. 967). However, Israeli residents of the settlements benefit from all provisions of the Minimum Wage Law while Palestinian employees in the settlements benefit only from the basic right to minimum wages but not from the additional rules guaranteeing this right. *See* LaborA 786/06 Ben-Or Toys v. Akhram Sultan (2008), Nevo Legal Database (by subscription) (Isr.).

117. Employment Service Law, 5719-1959, S.H. 270 p. 32 (Isr.).

118. Foreign Workers Law (Illegal Employment), 5761-1991, SH 1349 p. 112 (Isr.).

119. Emergency Labor Law, 5727-1967, SH 503 p. 86 (Isr.).

120. Order on Administration of Municipal Councils (Judea and Samaria) 1981, No. 892, Annex 6, §1 (Isr.).

121. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98, at ¶14.

122. *Worker's Hotline*, HCJ 5666/03, at ¶11.

workers on the basis of their nationality;<sup>123</sup> the construction applicable to nationals in the West Bank is therefore exceptional.

### *B. Extraterritorial Application of Israeli Legislation*

Israeli legislation provides that certain Israeli laws apply to Israeli individuals even outside Israel. Some legislation (e.g., extensive sections of the Penal Law of 1977) applies to Israeli nationals and residents regardless of where they are located.<sup>124</sup> Similarly, Israeli nationals and residents are subject to taxation in Israel even with respect to work performed outside the country.<sup>125</sup> Some legislation extends extraterritorially specifically to Israelis who reside in the West Bank. The Emergency Regulations (Judea and Samaria – Criminal Adjudication and Judicial Assistance of 1967) extend the application of seventeen Israeli laws to Israelis residing in the West Bank. These laws<sup>126</sup> do not apply to Palestinians, even when they are physically within the area of a settlement.<sup>127</sup> Other legislative instruments contain specific provisions that extend them to Israeli citizens (or persons entitled to citizenship, i.e., Jews) who are residents of the West Bank.<sup>128</sup> The legislation applicable extraterritorially in these manners does *not* include labor law. It is nonetheless of interest because it forms part of the background against which the employment relationship between Israeli employers and Palestinian employees is understood.

Alongside the extension of Israeli legislation to the West Bank through express stipulation in the law, Israeli legislation has also been extended to Israeli residents in the West Bank by judicial construction and interpretation. One example is *KPA Steel v. State of Israel*,<sup>129</sup> an appeal of a criminal conviction for tax evasion. The question before the HCJ was whether the interpretation of the

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123. The term 'nationality' is used as the international aspect of citizenship, namely the formal link between a state and an individual.

124. Penal Law, 5777-1977, 8 LSI 133, art. 15 (Isr.).

125. Income Tax Order, 5707-1947, art. 2 (amended 1989) (Isr.).

126. Among which are key instruments such as the Law on Elections, Income Tax Ordinance, Social Security Law, and Military Service Law, as well as minor instruments such as the Law on Surrogacy Agreements (Approval of Agreement and Status of the Newborn).

127. The Emergency Regulations (Judea and Samaria – Criminal Adjudication and Judicial Assistance), *supra* note 107. Emergency Regulations constitute primary legislation under Israeli law. Their validity is temporary, and therefore they are renewed periodically. In 2007 the Emergency Regulations (Judea and Samaria – Criminal Adjudication and Judicial Assistance) (1967) were renewed for a period of 5 years, until 2012. Their validity was limited to exclude the Gaza Strip, to which they applied until then. *See* Law Amending and Extending the Emergency Regulations (Judea and Samaria and Gaza Strip) (Criminal Adjudication and Judicial Assistance), 5767-2007, SH No. 2100, p. 363.

128. *See, e.g.*, National Insurance Law [Consolidated Version], art. 378, 1995-5795, SH No. 1522, p. 207 (Isr.); National Insurance Regulations (Applicability to Special Types of Insurees), 5747-1987, KT No. 5022 p. 747 (Isr.).

129. *See* CrimA 123/83 KPA Steel v. Israel 38(1) PD 813, ¶ 8 [1984] (Isr.); CA 1432/03 Yinnon v. Kara'an 59(1) PD 345 [2004] (Isr.).



provision in the Income Tax Ordinance extended its application to Israelis residing in the West Bank.<sup>130</sup> The HCJ ruled that a wide interpretation of the extension, necessary for charging the defendant with tax evasion, was legitimate under the rules on choice of law, given the settlers' expectation that tax law applies to them in all aspects.<sup>131</sup> This ruling is at odds with the principle that criminal provisions should be interpreted narrowly, and with the fact that choice of law doctrine applies only in private law matters. The same notion of extraterritorial extension of Israeli law to Israelis in the West Bank was taken a step further in rulings that did not interpret an explicit extension provision as in *KPA Steel*, but determined that there was an implicit provision to that effect. In *Bitton v. Helman*, for example, the Jerusalem District Court extended the licensing regulation under the Real Estate Agents Law to Israeli business conducted in the West Bank.<sup>132</sup> The court explained, *inter alia*, that the application of the Law to business in the West Bank was in line with the jurisprudence that "over the years, one step at a time, when confronted with a case that involves Israeli [citizens] living in Judea and Samaria, did everything possible to apply Israeli law to them and to view them as Israelis for all intents and purposes."<sup>133</sup> Of particular interest is the willingness of the courts to extend the application of Israeli public law on the basis of parties' expectations, a notion which belongs to the realm of private law. The laxness of the courts in applying established legal doctrines (such as the interpretation of criminal law or the distinction between public and private law) illustrates their disregard for legal mechanisms that a sovereign state should employ if it wishes to extend its law to an occupied territory. Such offhandedness in extending Israeli law to the settlements only reinforces the perception that the settlements are subject to Israeli law.

Applying the occupying power's domestic legislation to the occupied territory, whether expressly or by interpretation, is not without difficulty from an international legal perspective. In general, the occupant's civilian institutions are bound by the same constraints as the military commander, namely Article 43 of the Hague Regulations.<sup>134</sup> This includes the legislature, which is generally prohibited from legislating for occupied territory, because such legislation amounts to the unilateral annexation of an occupied territory. Nonetheless, Israeli courts have ruled that the power of the Knesset (Israel's parliament) to legislate for the occupied territory, at least for Israeli nationals, is not necessarily

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130. CrimA (123/83 *KPA Steel v. Israel* 38(1) PD 813, ¶ 8 [1984] (Isr.)).

131. *Id.*

132. CC (Jer.) 6718/05 *Bitton v. Helman*, 7 (2006), Nevo Legal Database (by subscription) (Isr.).

133. *Bitton*, CC (Jer.) 6718/05 at 7 (citing CA (Jer.) 739/03; *Gaoni v. Cohen*, (Mar. 11, 2003) Nevo Legal Database (by subscription) (Isr.), in which the District Court confirmed the powers of the head of execution office in the West Bank).

134. BENVENISTI, *supra* note 18, at 20.

restricted by the law of occupation, for example with respect to taxation.<sup>135</sup> This practice seems, at first glance, to follow post-World War II jurisprudence that has recognized as valid the application of an occupant's national law to its own nationals in the occupied territory. However, post-World War II jurisprudence developed with respect to nationals who were members of the occupant's military forces or related to those forces.<sup>136</sup> The situation with regard to other nationals—such as civilian settlers—is not as clear. Benvenisti argues that from a law of occupation perspective, the test should be whether the application of the national law would, directly or indirectly, have adverse effects on the local public order and on short and long-term local interests.<sup>137</sup> For example, to the extent that personal extraterritorial application of the occupant's law results in encouraging its nationals to emigrate to the occupied territory, this might impinge on the local "public order and civil life" and would thus be prohibited by international law.<sup>138</sup> It would also run counter to the express prohibition in Article 49 of the Geneva Convention on the transfer by the occupants of parts of its own civilian population into the territory it occupies. Arguably, this is pertinent to Israel, where the legislation for nationals in the occupied territory was enacted precisely in order to allow civilians to live in the West Bank (and Gaza Strip) under a standard similar to (if not higher than) that to which they were accustomed within Israel's national borders, as part of the campaign to encourage relocation to the settlements.<sup>139</sup>

A further difficulty in the extraterritorial application of Israeli law to Israelis is that it results in the differential application of legal regimes based on nationality within the West Bank territory. *Prima facie*, this is a discriminatory measure. One might argue that nationality-based discrimination exists whenever a state extends its law extraterritorially, and yet such a measure is not categorically prohibited under international law. However, the situation at hand is different from that of ordinary extraterritorial legislation, where the legislating state has no territorial control and can only prescribe for individuals related to it on a personal basis. In the present case, the state has territorial control and therefore bears the onus of proving that the distinction by nationality is justified with respect to each item of legislation, as it would with respect to legislation applicable within its own territory and even more. While a state may distinguish between nationals and non-nationals in particular instances (e.g., with respect to political rights), labor law is generally considered territorial, and distinctions on the basis of nationality are illegal.<sup>140</sup> Moreover, the preferential treatment of

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135. *KPA Steel*, CrimA 123/83 at ¶ 9.

136. BENVENISTI, *supra* note 18, at 21–22.

137. *Id.*

138. Amir Paz-Fuchs & Alon Cohen-Lifshitz, *The Changing Character of Israel's Occupation: Planning and Civilian Control*, 81 TOWN PLANNING REV. 585 (2010).

139. *See id.*

140. Convention on the Elimination of All Forms of Racial Discrimination, art. 1, 660 U.N.T.S. 195 (1965).

nationals in occupied territory may suggest expansionist ambitions that contravene the right to self-determination of peoples.

### *C. Collective Agreements*

As noted earlier, Annex 6 to the Code applies to the settlements' procedural sections of the Collective Agreements Law that are necessary for the application of extension orders.<sup>141</sup> By inference, Annex 6 does not apply to those sections of the collective agreements that have not been extended by specific orders. How do these arrangements affect employers, subject to collective agreements (either by signing directly or through membership in an employer's union), operating in the West Bank? This question concerns relations not only between employers and Palestinian employees, but also between those employers and Israeli employees. The confusion stems from a peculiar state of affairs: a collective agreement law exists in Israel, which creates a binding normative structure for an Israeli employer who wishes to sign it (directly or through an employers' union). Counter to the differing employment conditions experienced by different employers and Palestinian workers, Israeli jurisprudence seeks to apply rights that derive from collective agreements to all workers within the firm. The following are the parameters governing collective agreements in Israeli labor law: first, unless explicitly stated,<sup>142</sup> the collective agreement applies to *all* employees in the firm;<sup>143</sup> second, the workforce is viewed as a single business and as a single bargaining unit with distinctions between groups of employees permitted only as an exception to the rule<sup>144</sup> that views the workforce in a single business as a single bargaining unit; and third, certain distinctions between employees (e.g., on the basis of ethnic or national origin, gender, age, etc.) are prohibited.<sup>145</sup>

And yet, the NLC reasoned, the Collective Agreements Law (1957) applies *only to Israeli employees* of an Israeli employer operating in the West Bank. In addition, the NLC stated, "as a matter of course, a collective agreement covers employees in a particular sector or business *who are represented by the representative union*."<sup>146</sup> This outcome is in complete contravention of Israeli collective law principles. However, according to the Israeli Collective

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141. Extension orders are ministerial edicts that extend collective agreements to employees and employers who were not bound by the collective agreement originally.

142. LaborA 202/08 Sotovsky v. General Health Services (2008), Nevo Legal Database (by subscription) (Isr.).

143. Collective Agreements Law, 1957-5717, SH No. 221 p. 57, art. 15(3) (Isr.); LaborA 42/2-5 Histadrut v. Senior Paz Workers, 14 Labor Judgments 367(1983), Nevo Legal Database (by subscription) (Isr.).

144. LaborA 55/4-28 Senior Research Staff in the Sec. Org. v. Histadrut, 31 Labor Judgments 54 (1998), Nevo Legal Database (by subscription) (Isr.).

145. LaborA 400024/98 Histadrut v. Tzim, Israeli Shipping Co., 36 Labor Judgments 97 (2000), Nevo Legal Database (by subscription) (Isr.).

146. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 46 (emphasis added).

Agreement Law, provisions of a collective agreement apply to *all* the employees in a business that is subject to a collective agreement, whether employees are members in the relevant union, members in a different union, or not members in any union at all.<sup>147</sup> Indeed, in Israeli law, "there is no legal connection between union membership and coverage of collective agreements."<sup>148</sup> The HCJ made no mention of the collective agreements regime.

Under what conditions does a collective agreement apply extraterritorially? Harry Arthurs notes a 1967 transnational collective agreement purported to cover American and Canadian workers of Chrysler Corporation, despite the fact that each group was covered by the law of the jurisdiction in which it worked.<sup>149</sup> European labor law recognizes the possibility that a collective agreement applies to employees who are based outside the territory where the collective agreement was originally signed, solely by virtue of being employed by an employer who has signed the agreement.<sup>150</sup> This reflects the goal of the European Union to advance a single market. As such, the conclusion that collective agreements apply across borders within Europe is a natural extension of what may be termed European 'economic jurisprudence.' Even more relevant to the case at hand, the House of Lords analyzed the situation of an expatriate employee of a British employer operating "within what amounts for practical purposes to an extra-territorial British enclave in a foreign country."<sup>151</sup> In such a case, argued Lord Hoffman, "it would be unrealistic to regard him as having taken up employment in a foreign community in the same way as if [his employer] were providing security services for a hospital in Berlin."<sup>152</sup>

No similar 'economic jurisprudence' of integration is applicable with respect to the West Bank (at least not since the 1990s, when Israel recognized the economic interest of Palestine as separate from its own).<sup>153</sup> Therefore, one could plausibly argue, in contrast to the NLC's ruling, that since the Collective Agreement Law has not been applied explicitly in the West Bank, collective agreements do not apply extraterritorially to Palestinians *or* to Israelis. The reality, of course, is that Israelis perceive life in the occupied territories as identical to life in Israel, and Israeli employers have yet to contest the

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147. Collective Agreements Law, 1957-5717, SH No. 221 p. 57, arts. 15, 16 (Isr.).

148. MUNDLAK, *supra* note 33, at 79 (emphasis added).

149. Harry Arthurs, *Extraterritoriality by Other Means: How Labour Law Sneaks Across Borders, Conquers Minds and Controls Workplaces Abroad*, 21 STAN. L. & POL'Y REV. 527, 542-43 (2010). See David H. Blake, *Multi-National Corporation, International Union and International Collective Bargaining: A Case Study of the Political, Social and Economic Implications of the 1967 U.A.W.-Chrysler Agreements*, in TRANSNATIONAL INDUSTRIAL RELATIONS: THE IMPACT OF MULTI-NATIONAL CORPORATIONS AND ECONOMIC REGIONALISM ON INDUSTRIAL RELATIONS 137-172 (Hands Günter ed., 1972).

150. ROGER BLANPAIN, EUROPEAN LABOUR LAW 433, sec. 789 (7th ed., 2000).

151. *Serco v. Lawson* [2006] UKHL 3, ¶ 39

152. *Id.*

153. Israeli-Palestinian Interim Agreement, *supra* note 22, at Annex X (Protocol on Economic Relations).

application of collective agreements to Israeli workers.

The attitude of Israeli employers may be changing, as seen in a recent case. An employer operating in the West Bank argued that he is not required to pay membership fees to the Israeli employer organization<sup>154</sup> on the grounds that an obligation that stems from the Collective Agreement Act (in this case payment of membership fees to the employers' union) does not apply to employers operating in the West Bank. His argument was rejected by the Jerusalem District Labor Court, which ruled that "the claim that Israeli law applies only in the territory of the state (unless otherwise stated) conflicts with the HCJ's ruling in *Worker's Hotline*."<sup>155</sup> The court held that in *Worker's Hotline* the HCJ had ruled that the "contact count" test requires applying Israeli labor law to labor relations between employees and employers situated in territories, despite the fact that Israel has avoided applying Israeli law to the West Bank and the vast majority of labor statutes do not explicitly apply to the territories.<sup>156</sup> This reading of *Worker's Hotline* is erroneous: while the HCJ applied Israeli law as a matter of contractual choice, the District Labor Court interpreted it as an extraterritorial application of Israeli labor law in general. The Jerusalem District Labor Court's decision demonstrates the insouciance of the courts towards the extension of Israeli law to the West Bank.

Moreover, in *Worker's Hotline* the HCJ did not discuss the matter of collective agreements in general, or the application of the Collective Agreements Law in particular. The Jerusalem District Labor Court's ruling suggests that the *Worker's Hotline* decision may reach much further than is implied by the HCJ's language. Another implication of the ruling is that an inquiry into the application of the relevant collective agreements should have been included in the judgment.

#### *D. Private International Law Principles: Consent and Expectations*

Israeli extraterritorial legislation does not include labor law rights and interests; a limited number of labor laws apply through the Code with respect only to Israelis (whether employers or employees). Thus, the bulk of labor law remains regulated by Jordanian law, which, as the territorial law of the West Bank, applies to both Palestinians and Israelis.

And yet, Israelis employed in the settlements enjoy significantly more generous employment terms than Palestinians. The reason for the disparity is that when Israelis employ Israelis in the settlements, they operate under the premise that Israeli labor law applies, including its statutes, collective agreements, extension orders, etc. This factual situation was alluded to in the

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154. Labor Ct. (Jer.) 2879/06 Israeli Empl'r Union v. Better & Different (2009), Nevo Legal Database (by subscription) (Isr.).

155. *Id.* at ¶18.

156. *Id.*

HCI's emphasis on "the legal character of the Israeli settlements as an 'enclave' which is not de facto subject to the general law that governs that [West Bank] territory,"<sup>157</sup> and in Justice Jubran's concurring opinion that "in practice the Israeli enclaves have the legal status of Israeli towns, at least for the purpose of application of Israeli law and especially employment law. Workers who have Israeli citizenship and who work in these enclaves are subject to Israeli employment law, with all that it implies."<sup>158</sup> *Prima facie*, these statements are erroneous. They imply that the whole of Israeli labor law has been made applicable to Israelis in the settlements on either a personal or territorial basis.

However, as Chief Justice Barak has noted in a different case, "the presumption is that Israel legislation applies in Israel and not in the territories (i.e., in the West Bank), unless it is stated in legislation (expressly or by implication)."<sup>159</sup> Since labor law has not been extended to the West Bank, it could not be presumed to apply, even to the settlements, in the absence of express extension. On a more charitable reading, emphasizing the term "in practice" rather than "legally," Justice Jubran's statements refer, not only to the formal applicability of Israeli law in the settlements, but to the ground-level reality that as a matter of *fact*, Israeli settlers enjoy rights, terms and conditions that are indistinguishable from those enjoyed by employees employed within Israel. The source for this arrangement lies in the consensual application of Israeli law when an Israeli employer contracts with an Israeli employee in the settlements.<sup>160</sup> This choice of law is within the prerogative of any two sides to a contractual relationship, as long as employees are protected from being disadvantaged by the employer's choice of law.<sup>161</sup>

This state of affairs is true with respect to labor law as well. For example, when transnational corporations enter into employment contracts with employees who work abroad, they may include provisions that the law of the home country, rather than the country where the work is performed, will apply to their contracts. Moreover, a law may be "exported *sub rosa* because its values, assumptions, or requirements become embedded in the HR policies and workplace practices of transnational corporations."<sup>162</sup> Similarly, if Israeli employers and employees in the settlements agree that Israeli contract law applies to their relationships, they are well within their rights to make this

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157. *Worker's Hotline*, HCI 5666/03 at ¶ 25.

158. *Id.* at ¶ 11 (Jubran, J. concurring).

159. HCI 8276/05 *Adalah v. Minister of Defense* Isr. L. Rep. 352, ¶ 22 (2006) (Isr.) (citing to A. BARAK, *LEGAL INTERPRETATION: STATUTORY INTERPRETATION* 579 (vol. 2, 1993)).

160. The NLC seems to have grasped this, seeing the empty half of the legislative cup. After describing the relatively few labor laws that have been applied through extraterritorial legislation or military orders to Israeli settlers, it stated that "from the positive we learn the negative. Israeli laws that were not applied through military orders do not apply." *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 14.

161. COLLINS, EWING & MCCOLGAN, *supra* note 37, at 42.

162. Arthurs, *supra* note 149, at 540.

choice. The problem, addressed in the following section, is that the agreements reached with Palestinian employees contained different substantive terms from those contained in the agreements reached with the Israeli employees. This matter should have been addressed by the NLC and HCJ, but it was ignored almost completely.

In the absence of express stipulation as to the law governing the employment relations, it is necessary to identify the law to which the contract is most closely connected.<sup>163</sup> In the case of Israelis employing Israelis in the West Bank, it is obvious that, even in the absence of an express manifestation of consent, both parties *expect* Israeli law to apply. Thus, in *Kiryat Arba*,<sup>164</sup> the HCJ dealt, for the first time, with a labor dispute between an Israeli employer (the Civil Administration, which is an arm of the military commander) and two Israeli employees in the occupied territories. The HCJ emphasized the identity of the particular employer in that case, and ruled that the Civil Administration "carries with it" Israeli law.<sup>165</sup> In a later case, an employee of the municipality of the Ariel settlement was dismissed during her pregnancy, in *prima facie* breach of Israeli law.<sup>166</sup> The municipality sought to distinguish the case from *Kiryat Arba*, arguing that unlike the Civil Administration, a municipality is not the "long arm" of the occupying power.<sup>167</sup> The NLC rejected the argument, accepting without deliberation the Regional Court's ruling that since the municipality operated under the authority of the military commander, it was bound by Israeli labor law.<sup>168</sup> Given that the settlements and the Israeli industrial zones were also established by military decree, this rationale is presumably relevant for all employment relations in which the settlements (or their residents) and industrial zones are involved as employers.

Recently, in a situation that mirrors the facts presented in *Workers Hotline*, the NLC has gone one step further in applying Israeli law to the resolution of a dispute relating to work carried out in the West bank. The case, *Mahajneh v. Center for Democracy and Human Rights*, involved an Arab citizen of Israel who worked as an attorney for a West Bank-based Palestinian NGO that operated mainly in the occupied territories, but partly in Israel. His contract with the employer was written in Arabic and signed in Ramallah (in the West Bank), and he was paid in American dollars. Following his dismissal, Mahajneh charged that he was owed salaries and social benefits that had not been paid. The employer asked for summary dismissal of the claim on the ground that Israel was *forum non conveniens* and that the litigation should be held in

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163. *Menora*, CA 419/71, 26(2) PD at 531.

164. See HCJ 663/78 *Kiryat Arba Adm. v. Nat'l Labor Ct.* 33(2) PD 398 [1979] (Isr.).

165. See *id.* at ¶ 5.

166. LaborA 45/42-3 *Efron v. Ariel*, 17 Labor Judgments 209 (1986), Nevo Legal Database (by subscription) (Isr.).

167. *Id.* at ¶ 3.

168. *Id.*

Palestinian courts, under Jordanian law. The regional court accepted the claim for summary dismissal, but the NLC reversed the decision, ruling that "an Israeli employee's *reasonable expectation, as an Israeli citizen*, is that Israeli law will apply."<sup>169</sup> This ruling has several implications. First, it appears that the employee's Israeli citizenship is, in essence, sufficient to apply Israeli law to an employment relationship (presumably because of his expectations), even when the rest of the contacts pull in the other direction. Second, it appears that the employer's status as a West Bank based company is not a decisive factor that would necessarily preclude the application of Israeli law. This is significant since it tempers an employer's ability to manipulate the contact count simply by using a subcontractor.<sup>170</sup> And, third, the court, in its ability to reach a decision, seems almost uninhibited by the objective facts. In conclusion, the explicit, implied, or imputed expectation of parties has been used by the courts as a means for applying Israeli law to disputes that are closely connected with the West Bank but involve Israelis.

### *E. Conclusion*

The previous sections discuss various layers of norms that together constitute the legal system applicable in the West Bank. Palestinians are governed by Jordanian law and military enactment, while Israelis resident in the settlements are subject, alongside some Jordanian law and military enactments, to norms from other sources, namely Israeli legislation applied extraterritorially and the law on collective agreements.

For Israeli residents in the West Bank, the myriad of legal regimes creates a legal environment that is very similar to that which exists in Israel. This environment has been achieved by acts of all three arms of government: express extraterritorial legislation by the legislature, military enactments by the executive, and expansive and lenient interpretations of law and doctrine by courts. Yet this application is not systematic, and, combined with the casuistic method of adjudication, it results in patchy coverage. Moreover, doctrines that could rationalize gaps in the resulting regime, such as the jurisprudence on collective agreements, have not been utilized even when abundantly relevant.

This state of affairs is both procedurally and substantively objectionable. Procedurally, it yields an overly complex legal system that is difficult to apply. Substantively, the almost casual manner in which domestic courts have extended Israeli law to the occupied territories, when even the executive and legislator had not done so, is an issue of concern. The problem is exacerbated when the unclear legal regime serves as a point of reference in determining the law applicable to Palestinians employed in the settlements. Unarticulated premises

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169. LaborA 723/07 Mahajneh v. Ctr. for Democracy and Human Rights, ¶ 28 (2009) Nevo Legal Database (by subscription) (lsr.) (emphasis added).

170. See *supra* note 90 and accompanying text; Mundlak, *supra* note 11.



escape scrutiny, and pertinent rules are overlooked. The introduction of equality, itself a fundamental principle of the Israeli legal system, results in the entrenchment of disparities, as discussed in Part IV.

#### IV.

##### IMPLICATIONS FOR THE RIGHTS OF PALESTINIANS

Part III outlined the various components of the legal system that lead to the application of Israeli law to Israeli employees in Israeli-control occupied territory. We now consider the effect of this application on the employment of Palestinians, with respect to the securing of minimum standards, and to equality between Palestinians and Israelis, particularly in the terms and conditions of employment. This latter aspect of equality was not raised at all, let alone answered, by any of the courts dealing with the issue of the employment of Palestinians by Israelis in the West Bank.

##### *A. Protective Legislation: Minimum Conditions*

Notwithstanding the general rules on choice of law, the HCJ noted that the unique principles of labor law, derived from the disparity of powers between employer and employee, require applying mandatory rights and principles, even if those are not guaranteed under the legal system which the parties have purportedly agreed to apply.<sup>171</sup> Indeed, notwithstanding the NLC's and the HCJ's cursory references to *equality* of terms and conditions, both courts actually focused on the question of whether Palestinians employees are entitled to *minimum* core rights under Israeli law. This minimum could have been guaranteed to the Palestinian employees without the sweeping application of Israeli law to their relations with Israeli employers, and thus without delving into a jurisprudential and political minefield.

The notion that choice of law rules should aim to protect a weak party is not uncontroversial. In theory, the classical choice of law rules only serve to indicate the applicable law, without regard to its content. The contents of foreign law only become relevant if, subsequent to the choice process, they turn out to conflict with fundamental principles of public policy or with mandatory laws of the forum. But neither source of conflict necessarily protects weaker parties in a particular case.<sup>172</sup> However, partly under the influence of the American interest analysis approach, doctrine has evolved in a manner that directs attention to the laws competing for application<sup>173</sup> in order to protect discrete categories of parties, including employees. Thus, the Rome Convention recognizes the special nature of the contract of employment and contains special provisions intended to

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171. *Worker's Hotline*, HCJ 5666/03 at ¶ 21.

172. Pocar, *supra* note 86, at 353–57.

173. NYGH, *supra* note 86, at 141.

protect the employee. Article 6(1) provides that a choice of law made by the parties shall not deprive the employee of the protection afforded to him or her by the mandatory rules of the law to which the contract is *most* closely connected.<sup>174</sup> This prevents the stronger party from abusing the freedom to choose the applicable law in order to evade the requirements of protective labor law. In addition, Article 7(1) provides that "effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract."<sup>175</sup> This refers to mandatory rules under a legal system which is closely connected to the contract, but which is not necessarily the most closely related to it.<sup>176</sup> The legal system itself must apply these rules in the circumstances, regardless of the law generally applicable to the contract. These rules, sometimes referred to as 'directly applicable' (*lois d'application immédiate*) or 'internationally mandatory' rules, dispense with the need for a choice of law analysis with respect to the specific issues that they regulate, because it is not necessary to establish that the system from which they emanate is the one most closely connected to the contract. Under both Articles 6 and 7 of the Rome Convention, the contract would remain subject either to the law most closely connected to it or to the law chosen by the parties, except with respect to the issues addressed by either type of mandatory rules.<sup>177</sup> In essence, mandatory rules are similar to what the NLC referred to as "positive public policy."<sup>178</sup> They allow the court to take account of public policy considerations and impose its own law as part of the contract, in addition to the applicable foreign law. Indeed, in at least one case, where the NLC refused to apply Israeli law to the Palestinian plaintiffs, the court accepted the applicability of Israel's Minimum Wage Law on the basis of public policy.<sup>179</sup>

The unique features of labor law offer another mechanism that enables the applicability of protective labor law to Palestinians employed by Israel settlers. It may be recalled that the Order on Municipal Councils, from which the Code derives, applies to residents of the councils (i.e., only to Israeli settlers).<sup>180</sup>

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174. Rome Convention, *supra* note 45, art. 6(1).

175. *Id.* at art. 7(1).

176. The term 'close connection' has been criticized as insufficiently precise and predictable, leading the UK to enter a reservation to the Convention. See David McClean & Kisch Beevers, MORRIS' THE CONFLICT OF LAWS 390 (7th ed. 2009); Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, 980 O.J. (C 282), 28-29. For present purposes this does not present a problem, since the mandatory rules in question are within the Israeli law, to which the contracts at issue are closely, if not most closely, connected.

177. Andrea Bonomi, *Mandatory Rules in Private International Law—The Quest for Uniformity of Decisions in a Global Environment*, 1 Y.B. PRIV. INT' L. 215, 227 (1998).

178. See *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 35 (author's translation).

179. LaborA. (Jer.) 300480/95 *Makdadi v. Civil Admin.* in *Judea and Samaria*, 35 Labor Judgments 70, ¶ 24 [2000] (Isr.).

180. See *supra* note 114 and accompanying text; see *infra* Section (IV)(B)(ii)(a) Extraterritorial

However, it is possible to read the Order as establishing the platform not only for the rights of settlers, but also for their obligations. More precisely, the Code may be seen as applying to Israelis not only as employees but also as employers,<sup>181</sup> and consequently to their Palestinian employees.

Employers' obligations may also be particularly apt objects of extraterritorial application. US courts have recognized Congress' authority to pass laws that have extraterritorial effects.<sup>182</sup> In fact, US legislation contains provisions that explicitly expand statutes' extraterritorial reach to American employers who control companies incorporated and operating in foreign countries.<sup>183</sup> The same is true for some British laws.<sup>184</sup> This approach was also adopted judicially by the HCJ in a matter closely related to the one under investigation here. In *Kiryat Arba*<sup>185</sup> and in *Efron v. Ariel*,<sup>186</sup> the HCJ and NLC respectively inspected the rights of Israeli employees who were dismissed by their Israeli employer. The Courts concluded that Israeli law applied to the case based on the strong connection that the employer has to the Israeli government as the occupying power. The HCJ states that:<sup>187</sup>

Israeli employees, employed by the regional commander . . . are subject to Israeli labor law . . . In other words, the drawing of administrative powers based on international law does not detach the authority from the sovereign that erected it.

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Application of the Legal Right to Equality at Work.

181. Courts have expressly suggested, in the context of a tort case, that Israeli law should apply to the relations between an Israeli employer and a Palestinian employee in the settlements because it is directed at the employers. CC (Jer.) 1632/96 Alsuf v. Ariel Metal and Another, ¶ 6 (2002), Nevo Legal Database (by subscription) (Isr.).

182. James Mathieu, *The Supreme Court's Not So Clear Statement in Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 21 BROOKLYN J. INT'L L. 939 (1996); Todd Keithley, *Does the National Labor Relations Act Extend to Americans Who are Temporarily Abroad?*, 105 COLUMBIA L. REV. 2135, 2144 (2005).

183. Age Discrimination in Employment Act, 29 U.S.C. §§ 623(f), (h) (1976); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1(a), (c)(2) (1964) (*but cf.* EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (offering a narrow interpretation)); Americans with Disabilities Act, 42 U.S.C. §§ 12111(4), 12112(c)(2)(B) (1994). These U.S. anti-discrimination laws reach outside the U.S., but only to the limited extent that they reach U.S. citizens working for U.S.-controlled employers. See Paul Secunda, "The Longest Journey, With A First Step": *Bringing Coherence to Sovereignty and Jurisdictional Issues in Global Employee Benefits Law*, 19 DUKE J. COMP. & INT'L L. 107 (2008).

184. See Employment Relations Act, 1999, c. 26 § 32 (U.K.); Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations, 1999, S.I. 3163 (U.K.) (entitling those working outside Great Britain to equal treatment); Sex Discrimination Act, 1975, c. 65, § 10 (U.K.) (providing that employment is regarded as part of a British establishment if (a) the employee does his work at least partly in Great Britain; or (b) the employee does his work wholly outside Great Britain but the employer has a place of business in Great Britain, work is carried out for that establishment, and the employee is ordinarily a resident in Great Britain). The Posted Workers Directive motivated Britain to guarantee more rights to workers employed abroad. See Thomas Linden, *Employment Protection for Workers Working Abroad*, 35 INDUS. L. J. 186 at 187 (2000).

185. See *Kiryat Arba Adm.*, HCJ 663/78, 33(2) PD.

186. LaborA 45/42-3 *Efron v. Ariel*, 17 Labor Judgments 209 (1986), Nevo Legal Database (by subscription) (Isr.).

187. *Kiryat Arba Adm.*, HCJ 663/78, 33(2) PD at 403-04.

The military commander does not hover in air, detached from the source that launched him to battle and then to administration, but rather continues to absorb from it his status in the region.

The advantages and limits of applying minimum standards extraterritorially should be stated. On the one hand, the extraterritorial application of protective labor law is not subject to the contact analysis, thus avoiding the perceived ambiguity and subjectivity inherent in such a multifaceted criterion. This ambiguity is demonstrated in the opposing conclusions of the HCJ and NLC. In addition, extraterritorial application of protective labor law preempts manipulation of the contact count, as in the case of an Israeli employer enlisting a Palestinian intermediary so as to avoid the application of Israeli law. On the other hand, since extraterritorial application of law is an exceptional measure, the question arises as to how wide the interpretation of extraterritorially applicable labor law should be.<sup>188</sup> One indication that there might be hierarchy in labor rights, which would support a narrow extraterritorial application, is the International Labor Organization (ILO) 1998 Declaration on Fundamental Principles and Rights at Work.<sup>189</sup> The Declaration purports to reflect standards applicable to all states, regardless of individual conventional undertakings. It lists four "core labor standards,"<sup>190</sup> paving the way for arguments that rights outside the core standards, such as the right to limits on working hours, reasonable rest periods or to a safe and healthy workplace, let alone collective rights and rights originating from collective agreements, hold a more limited normative value<sup>191</sup> and therefore would not be regarded as applicable extraterritorially.

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188. The international human rights obligations of a state in the area of labor law apply outside its sovereign territory, including in territory under occupation. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 163, ¶ 112 (July 9); International Covenant on Economic, Social and Cultural Rights arts. 7 & 8, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; *Al-Skeini v. United Kingdom*, 1093 Eur. Ct. H.R. ¶ 138 (2011). The discharge of such obligations, however, cannot be carried out through extraterritorial extension of domestic legislation.

189. International Labor Organization, ILO Declaration on Fundamental Principles and Rights at Work and Annex, art. 2, June 18, 1998, 37 I.L.M. 1233.

190. The four core labor standards are: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation. *Id.*

191. Philip Alston, 'Core Labor Standards' and the Transformation of International Labour Law, 15 EUR. J. INT'L L. 457, 486 (2004). But cf. Brian Langille, *Core Labor Rights—The True Story*, 16 EUR. J. INT'L L. 409, 428 (2005); Guy Mundlak, *Changing Welfare Regimes*, in THE WELFARE STATE, GLOBALIZATION AND INTERNATIONAL LAW 231 (Eyal Benvenisti & Georg Nolte eds., 2004). The differentiation between rights (or principles) under the Declaration has been criticized both in principle, as a significant departure from the insistence within the international human rights regime on the indivisibility and equality of all rights, and on its merits, since the core itself is "not necessarily based on any coherent or compelling economic, philosophical or legal criteria, but rather reflects a pragmatic selection of what would be acceptable at the time." Alston, *supra* note 191, at 459, 485.

To conclude, the courts could have applied Israeli law to the employment of the Palestinian employees as a matter of enforcing non-derogable minimum rights. This route would have been grounded in law, but might have been of limited value: first, because the range of minimum rights is too ambiguous, and second, because the application of these rights could be undermined with relative ease by changing the employment structure from a direct to a triangular form of employment. Of particular interest is whether the court could have included the right to equality among employees with respect to terms and conditions of work, itself a core right under Israeli labor law. Instead, the HCJ opted to rely directly on the principle of equality. The following section discusses the role of this principle in the NLC and HCJ's rulings and in addressing the employment of Palestinians in the Israeli settlements more generally.

### B. Equality

The fundamental difference between the NLC's approach in *Givat Ze'ev* and the HCJ's reasoning in *Worker's Hotline* is the significance that they attached to equality as a rationale in choice of law issues. Before addressing each of their positions, it is useful to inquire whether we value equality, and if so, what kind of equality. In the context of labor relations and employment, arguably the priority should be the guarantee of minimum standards, such as a decent living wage, respect at work, and a proper work/life balance, rather than equality. Joseph Raz is probably the best-known expounder of the idea that equality has no *intrinsic* value, although "some equalities are sometimes instrumentally valuable, as they are useful for securing some valuable outcome."<sup>192</sup> When discussing distributional goods designed to forestall hunger, Raz argues that "[w]hat matters is that the factor which made the distribution good or valuable was not that it was equal, but rather that it avoided hunger."<sup>193</sup>

It is interesting that Raz chose hunger as an example for the irrelevance of equality considerations. As Amartya Sen's analysis of the Great Bengal famine of 1944 reveals, (lack of) equality may determine whether or not particular groups have access to particular goods in the free market. According to Sen, the Great Bengal famine was caused not by a shortage of food, but by a sudden drop in purchasing power following stratification of incomes among Bengalis.<sup>194</sup> Inequality in the distribution of an instrumental good affected the ability of people to satisfy their need for an end-use good, a need which itself is fixed, independent of how much of that good anyone else has.<sup>195</sup> Another lesson that

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192. Joseph Raz, *On the Value of Distributional Equality* 3 (Oxford Legal Studies Research Papers, Paper No. 4, 2008).

193. *Id.* at 4–5.

194. See Amartya Sen, *Starvation and Exchange Entitlements: a General Approach and its Application to the Great Bengal Famine*, 1 CAMBRIDGE J. ECO. 33, 55–56 (1977).

195. Robert Goodin, *UTILITARIANISM AS A PUBLIC POLICY*, 244–265 (1995).

can be gleaned from Sen's analysis is that the notion and relevance of equality cannot be considered *in abstracto*. Instead, equality must be assessed in light of its interrelation with other objectives of legal regulation of the relevant sphere. In doing so, we must not only ask 'equality amongst whom' (Israelis and Palestinians? employers and employees?) but, even more importantly in our case, 'equality of what?'<sup>196</sup>

The NLC clearly distinguished between prohibited discrimination in terms and conditions and justifiable distinction in the applicable law. The NLC continued that, while discrimination in the workplace on the basis of race or nationality is patently prohibited, "there may be special circumstances that justify this reality."<sup>197</sup> It concluded that the courts of lower instance should decide such factual matters.

The HCJ confused two very different objects of equality: equality of law and equality of conditions. Thus, Justice Rivlin mentioned that the contact count may be affected by the "principle of equality—equal pay and condition for equal work, or work of equal worth."<sup>198</sup> He was referring to equality in individuals' terms and conditions of employment. However, the judgment concludes by ruling that the petition is accepted, in the sense that Israeli law should apply equally to Israelis and Palestinians. Similarly, Justice Jubran quoted Article 1 of the ILO Discrimination (Employment and Occupation) Convention, which describes discrimination in "opportunity or treatment in employment or occupation" as including discriminatory "access to . . . employment and to particular occupations, and *terms and conditions of employment*."<sup>199</sup> However, Justice Jubran immediately clarified that the issue at hand is the distinction between Israeli and Palestinian employees with respect to the *law* that governs the employment relationship.<sup>200</sup> The following subsection focuses on the matter that was seen by both courts to be central: whether Israelis and Palestinians should both be subject to Israeli law. It also offers a critique of the right of Palestinians to enjoy not only equal laws, but also equality in terms and conditions of employment. This is an important issue that neither the NLC nor the HCJ addressed.

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196. Amartya Sen, *Equality Of What?*, Tanner Lecture on Human Values at Stanford University (May 22, 1979).

197. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 43.

198. *Workers' Hotline*, HCJ 5666/03 at ¶ 21

199. International Labor Organization, Discrimination (Employment and Occupation) Convention, art. 1(a), 3, July 5, 1958, I.L.O. No. 111, 362 U.N.T.S. 31.

200. *Workers' Hotline*, HCJ 5666/03 at ¶ 4 (Jubran, J., concurring). In a recent case, *Masad v. Kibbutz Galgal*, the Jerusalem District Labor Court explained that "the HCJ in *Givat Ze'ev* emphasized the importance of applying *equal law* to workers that are not dissimilar in any relevant fashion and that are carrying out equal work or work of equal worth." Labor Ct. (Jer) 1729/10 Masad v. Kibbutz Galgal, ¶ 26 (Aug. 11, 2011) Nevo Legal Database (by subscription) (Isr.) (emphasis added).

*i. Equality of Law - Applicable Systems of Law*

*a. The Role of Equality in Choice of Labor Law*

The HCJ assumed that the resolution of a labor dispute should be guided by the principle of equality in the applicable system of law between Palestinians and Israelis employed by the same employer in the settlements. The court expressed this ideal by noting that in the unlikely situation in which there are no "concrete" contacts, the court may have recourse to objective ones, such as the law applicable to similar contracts, in similar circumstances, between similar parties.<sup>201</sup> The HCJ explained that its conclusion on the contact count realized the principle of equality.<sup>202</sup>

The significance of equality as a principle in private international law jurisprudence should not be overstated. Fundamentally, the entire choice of law doctrine is based on the notion of different laws applicable to different people in different places.<sup>203</sup> Mark Gergen makes a blunt case for "the irrelevance of equality" in such matters, stating "unequal treatment of people is unavoidable in the conflict of law."<sup>204</sup> In a manner that seems quite pertinent to the issue at hand, he argues that "[a]rguments about inequality in the conflict of laws often collapse back into the author's preference for a territorial or personal order."<sup>205</sup>

Indeed, neither the text of the Rome Convention nor its authoritative interpretation mentions equality. The explanatory preamble to the Rome I Regulation, which incorporates the Rome Convention into the law of the European Union, provides that, in determining the law most closely connected to a contract, "account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts."<sup>206</sup> Yet, rather than equality among contracts *per se*, this provision seems to aim at ensuring uniformity in governing law where such is required to guarantee the effectiveness of contracts. In practice, under the European approach and the presumption that labor contracts are governed by the law of the territory in which the work is performed, similar contracts are likely to be governed by the same law. On the other hand, under the system prevalent in some areas of the US, largely similar situations may be treated differently in terms of governing

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201. *Workers' Hotline*, HCJ 5666/03 ¶ 18.

202. *Id.* at ¶ 21.

203. In fact, in Israel different personal laws apply to Israeli citizens in the areas of marriage and divorce. This is even considered a liberal and multicultural approach (at least as far as the Arab minority is concerned). See Michael M. Karayanni, *Choice of Law Under Occupation: How Israeli Law Came to Serve Palestinian Plaintiffs*, 5 J. PRIVATE INT'L L. 1, 40-41 (2009).

204. Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 902 (1998). See also Wengler, *supra* note 95, at 822-23, 858.

205. Gergen, *supra* note 204, at 903.

206. Rome I Regulation 593/2008 ¶ 20 2008 O.J. (L 177) 6 (EC).

law.<sup>207</sup>

The different rulings of the NLC and of the HCJ are, in part, a result of the different perspective taken by the courts on the significance of equal treatment of people. The HCJ attached importance to the like treatment of like people, stating that Palestinians working in the settlements should be treated as Palestinians working in Israel.<sup>208</sup> The NLC saw no fault in the fact that, in principle, different people are employed under different laws. It relied, *inter alia*, on its own jurisprudence that distinguished between Israeli nationals serving in an embassy abroad and local employees of the same embassy, and between an Israeli policeman serving in the West Bank and a local policeman.<sup>209</sup> In both cases, the Israeli nationals benefited from the terms of Israeli law, which dovetails with the power structure in the area, while local employees benefited only from the terms of local law.<sup>210</sup>

It is true that the NLC's approach is more in line with private international law principles, under which the application of different law to different individuals is not, in and of itself, discriminatory.<sup>211</sup> And yet, the NLC's judgment is not free from difficulty in its juxtaposition of private international law jurisprudence, which is founded on the neutral precept of respecting equality of states, at times at the expense of equality of people, with a situation that is anything but neutral. Gergen, for example, rejected the introduction of equality considerations into choice of law deliberations, instead arguing forcefully for territorial choice of law rules based on a territorial nexus, which he hails for their neutrality.<sup>212</sup> The legitimacy of choice of law rules depends on the laws not advantaging or disadvantaging any group in a predictable way. Territorial rules satisfy this requirement since "[e]veryone has a roughly equal chance of losing or winning under a territorial approach."<sup>213</sup> However, in the case of Palestinians employed by Israelis in the settlements, the neutrality of the territorial approach in this case fails on two grounds. First, Israel controls the law of both territories. Second, within the territory of the West Bank, the law applies on a personal basis that is anything but neutral. To the contrary, the NLC has set the choice of law rules in a manner that denies Palestinian, but not

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207. See e.g., *Tooker v. Lopez*, 249 N.E. 2d 394 (1969); *Neumeier v. Kuehner*, 286 N.E. 2d 454 (1972). But see *Neumeier v. Kuehner*, 286 N.E. 2d 454 (1972) (Bergan, J. dissenting) (rejecting any distinction between plaintiffs on the basis of their residence—granted, equality between workers might be more significant than between torts plaintiffs).

208. *Workers' Hotline*, HCJ 5666/03 ¶ 26.

209. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 38.

210. *LaborA 48/4-7 Abu Tir v. Israeli Police*, 21 Labor Judgments 28 (1989) Nevo Legal Database (by subscription) (Isr.).

211. See Wengler, *supra* note 95, at 854-55; *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶¶ 620-21.

212. Gergen, *supra* note 204, at 918-19.

213. *Id.* at 919. See also Wengler, *supra* note 95, at 830.



Israeli, employees the benefits of Israeli law.<sup>214</sup> When the territorial law is skewed in favor of one kind of employee, and does not guarantee an equal chance, it presents a strong case for the application of the principle of equality to mitigate the harm caused by reference to territorial law.<sup>215</sup>

It is not surprising that both the HCJ and the NLC avoided the politically loaded questions related to the status of the settlements and of Israeli law applicable to them, but rather took the existing situation as a baseline. And yet, this avoidance means ignoring the wider reality of Israeli and Palestinian economic existence in the West Bank.

*b. Self-determination and the Law of Occupation as Constraints on Equality in Law*

One of the arguments put before the HCJ as to why it should refrain from subordinating the contracts of Palestinians to Israeli labor law was that choice of law rulings should not serve as a backdoor for achieving what the Israeli parliament and executive (through the military commander) would not: a blanket application of Israeli law to the settlements.<sup>216</sup> The court replied that a choice of law ruling applying Israeli law to a contract made in the West Bank, or to which a resident of the West Bank is party, does not affect that sovereign status of the West Bank.<sup>217</sup> While generally true, this principle does not mean that choice of law rules do not have any implications for the international legal order. Indeed, the Second Restatement of the Conflict of Laws lists "needs of the interstate and international system" first among the factors that a court should examine in any policy analysis,<sup>218</sup> indicating that such implications are not only possible but

214. See Aeyal Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUR. J. INT'L L. 1, 8 (2007).

215. Mundlak, *supra* note 11, at 216; Wengler, *supra* note 95, at 825.

216. Brief of the Attorney General, *supra* note 32, at ¶ 9.

217. *Id.* at ¶ 12. Ironically, the authority quoted by the Court has nothing to do with choice of law rules, and in fact establishes the opposite of the Court's assertion. The Court quoted the *Abu Salah* case, which concerned the extension of Israel's "law, adjudication and administration" to the Golan Heights in the Golan Heights Law, 5741-1981, 36 LSI 7 (Isr.). In that case the HCJ said that the extraterritorial application of an Israeli norm to an area outside Israel's territory does not, under Israeli law, automatically render that area part of Israel. With the benefit of thirty years' hindsight, there are few who would argue that this was precisely the intended effect of the Golan Heights Law, and that the *Abu Salah* ruling was a less than successful attempt to avoid acknowledging that Israel had purported to annex the Golan. The Attorney General's supplementary brief in *Givat Ze'ev* provides: "... the regions of Judea, Samaria and Gaza are not part of the State of Israel, since it was not declared that 'the law, adjudication and administration of the State' would apply in them." Brief of the Attorney General, *supra* note 32, at ¶ 11. This is an acknowledgement that the State regards the Golan Heights Law (1981), which contains such a declaration, as annexing the Golan Heights to Israel. On the Status of the Golan Heights, see Leon Sheleff, *Application of Israeli Law to the Golan Heights is Not Annexation*, 20 BROOKLYN J. INT'L L. 333 (1994) and Asher Maoz, *Application of Israeli Law to the Golan Heights is Annexation*, 20 BROOKLYN J. INT'L L. 355 (1994).

218. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §6(2)(a) (1971). This factor has been

should be taken into account.

The engagement of states with choice of law rules is a reflection of comity and reciprocity as guiding principles of the international legal order.<sup>219</sup> These principles provide a strong basis for applying territoriality, rather than equality, as a fundamental theory of choice of law rules. More specifically, in the context of labor law, territoriality is actually a means of advancing equality between employees.<sup>220</sup> Yet, in terms of the law applicable in the occupied territories, Israeli courts have not given much deference to the needs and interests of other sovereigns. This attitude was not based on an appreciation of the dispute over the sovereignty of the West Bank and Gaza Strip. Rather, unlike ordinary situations involving choice of law questions, in the occupied territories no other state entity enforces local law. *Kaplan v. Gabay*, for example, concerned a tort action between Israeli parties with respect to a boating accident that had taken place in the Sinai, which was at the time under Israeli occupation.<sup>221</sup> The then-existing Israeli law required the plaintiff to show a cause of action under both Israeli law and the *lex loci delicti*, namely Egyptian law. The Israeli district court ruled that the requirement to show a claim under Egyptian law could be exceptionally dismissed, because the area was "under foreign sovereignty only *de jure*, but under Israeli control in practice."<sup>222</sup> Since no Egyptian parties were involved, the disregard for Egyptian law was uncontroversial. In *KPA Steel*, the court applied the same rationale to justify an expansive interpretation of Israeli legislation so that it applied extraterritorially in the West Bank. In court noted that application of Israeli law in occupied territory "does not infringe in practice on the sovereignty of any other state."<sup>223</sup> Arguably, if the constraint of respecting a foreign sovereign is removed, greater weight can be attached to the principle of equality among employees through the application of the same system of law.

At first glance, the Court's reasoning runs diametrically counter to the premise of the law of occupation, which, we argue, is that any legal act by the

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labeled "largely irrelevant," and "silly." *Shasta Livestock Auction Yard Inc. v. Evans Corp.*, 375 F. Supp. 1027, 1033 (1974); W. A. Reepy, *Eclecticism in Choice of Law: Hybrid Method or Mish-mash*, 34 MERCER L. REV. 645, 663 (1983). No case has ever turned on it. Lea Brilmayer, Jack Goldsmith, and Erin O'Hara O'Connor, CONFLICT OF LAW: CASES AND MATERIALS 239 (6th ed. 2011). However, it has been suggested as a means of introducing public order considerations, such as refraining from applying the law of a country if it falls below the level of law of civilized nations. Luther L. McDougal III, *Toward the Increased Use of Interstate and International Policies in Choice-of-Law Analysis in Tort Cases under the Second Restatement and Leflar's Choice-Influencing Considerations*, 70 TUL. L. REV. 2465, 2484 (1996). As pointed out above, under the U.S. approach, such considerations figure in the determination of the law most closely connected to the contract rather than as a break on its application, as they do under the European System.

219. Eugene F. Scoles et al., CONFLICT OF LAWS 19-20 (4th ed. 2004).

220. Mundlak, *supra* note 11, at 211.

221. Misc. requests (TA) 151/80 Kaplan v. Gabai, 1982(2) PM 290 [1982] (Isr.).

222. *Id.* at 298 (following Chaplin v. Boys, (1969) (A.C.) 1085 All E.R. at 2 (Eng.)).

223. *KPA Steel*, CrimA 123/83 at ¶ 8.

occupant infringes upon the interests of the ousted sovereign, and therefore, must be limited to the absolutely necessary minimum. If in 1983 courts could maintain that sovereignty in the West Bank was not vested in any particular body, they would be hard pressed to repeat such a decision today; it is widely agreed that it is not sovereignty as such that ought to be preserved, but the ability to exercise the right to self-determination. Accordingly, the interests of the Palestinian people in the West Bank and Gaza Strip, whose right to self-determination Israel has recognized in 1978, and again in 1993, cannot be entirely ignored.<sup>224</sup> The situation is nonetheless complicated by the fact that no state claims sovereignty in the West Bank or Gaza Strip. Thus, although pre-1967 Jordanian law is applicable territorial law, it is a hollow representation of sovereignty. A choice of law rule that would respect the modern form of sovereignty, namely the right to self-determination of the Palestinians, requires taking account of Palestinian labor law. However, the legislative powers of the Palestinians under the Interim Agreement<sup>225</sup> do not extend to the settlements. Consequently, the courts are correct in their assertion that there is little that stands in the way of applying Israeli law to the exclusion of other laws.

Iris Kanor argues that by a variety of choice of law tactics, Israeli courts no longer regard the occupied territories as held in trust. Instead, they assist in the gradual incorporation of these territories under Israeli governance.<sup>226</sup> This, she asserts, is in line with a trend identified over twenty years ago by Amnon Rubinstein and Michael Shalev, who posited that the gradual erasure of the legal separation between Israel and the territories amounts to a "creeping annexation,"<sup>227</sup> such that speaking of the area as outside Israel becomes disingenuous.<sup>228</sup> Michael Karayanni's study on Israel's personal jurisdiction<sup>229</sup> complements this insight in regards to the personal jurisdiction of the courts. Karayanni demonstrates that Israeli jurisdiction was extended to the West Bank in order to serve the Israeli settlers, as part of establishing total control over the West Bank. This extension had the inadvertent effect of bringing under the jurisdiction of Israeli courts not only Israeli settlers, but also Palestinians. When the Palestinian population of the West Bank became a burden on the courts, a personal jurisdiction doctrine evolved to exclude disputes in which both parties

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224. Camp David Framework for Peace in the Middle East, 17 I.L.M. 1466, sect. A(c) (1978); Declaration of Principles on Interim Self-Government Arrangements preamble, Sept. 13, 1993, 32 I.L.M. 1525.

225. Israeli-Palestinian Interim Agreement, *supra* note 22 at Annex III, Appendix 1, art. 21(1).

226. Iris Kanor, *Israel and the Territories: the Interplay between Private International Law and Public International Law*, 8 MISHPAT UMIMSHAL 551, 599 (2005) (in Hebrew).

227. Michael Shalev, *LABOUR AND THE POLITICAL ECONOMY IN ISRAEL* 58 (1992).

228. Kanor, *supra* note 226, at 599 (citing Rubinstein, *supra* note 113, at 440).

229. Michael Karayanni, *The Quest For Creative Jurisdiction: The Evolution of Personal Jurisdiction Doctrine of Israeli Courts toward the Palestinian Territories*, 29 MICHIGAN J. INT'L L. 666 (2008).

were Palestinian from the Israeli courts.<sup>230</sup> *Worker's Hotline* demonstrates that insofar as territorial control of the settlements' areas is concerned, the Israeli grasp continues. The Court's ruling was based not on a pure choice of law claim, but also on the application of Israeli law through the unarticulated basis of an expectation imputed to the parties. What both the Israeli legislature and military failed to achieve, the Court ultimately accomplished: it extended the application of Israeli labor law to the *territory* of settlements, with the exception of consent-based instances where all of the employees are Palestinians. Admirable as it may be for this law to apply uniformly to all employees in the occupied territories, this judicial activism is in contravention of the law of occupation, which prohibits the territorial extension of the occupant's law to the occupied territory, regardless of the domestic doctrine that leads to such an outcome.

One could also point out that it was the Palestinian employees who argued for, and who benefit from, the application of Israeli law rather than Jordanian law.<sup>231</sup> This argument, however, does not exempt the Court from its obligation to act in accordance with Israel's international legal obligations. These obligations may include taking account of the implications of the right to self-determination of the Palestinian people, even if they run counter to the personal interests of the individuals before the court. Individuals may contract out of their self-determination interest, and had there been an express stipulation in employment contracts that Israeli law should govern, the Court might have been correct to give effect to such a stipulation. However, when determining the *principles* governing its choice of applicable law, the Court should not disregard international legal principles, even if they do not *a priori* tip the balance one way or the other.<sup>232</sup> On balance, despite the fact that the petitioners were Palestinians, the right to self-determination of the Palestinian people should probably not have guided the Court to a different conclusion than the one it reached. Unfortunately, the failure of the Court to appreciate the significance of the territorial law applicable to the settlements as a factor in a weighted contacts count is disturbing. Of course, one cannot disregard the fact that, given Israel's extensive control over the West Bank (which in many ways amounts to *de facto* annexation) an argument that the Court should refrain from applying Israeli labor law—lest it would undermine Palestinian self-determination or entrench the *de facto* annexation—might appear somewhat hypocritical.

In conclusion, as the NLC has stated, equality is not ordinarily a guiding principle in choice of law in labor disputes. However, equality may have a remedial role when the neutrality of law, which underlies the common rule that a contract be governed by the law of the territory where the work is performed, is undermined. At the same time, the HCJ's approach of demanding equality in terms of the applicable legal system does not provide the necessary safeguards

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230. *Id.* at 680; Rubinstein, *supra* note 113, at 449-50.

231. For more on this dilemma, see Karayanni, *supra* note 203; Sfard, *supra* note 18, at 169.

232. Gross, *supra* note 214, at 7; Karayanni, *supra* note 203, at 29.

against employee exploitation because it disregards the political context in which the employment relationship takes place, namely the fundamental inequality inherent in a situation of occupation. While this inequality is a factor that a court would find difficult to take into account when resolving a specific dispute, it is an important one to consider when analyzing the situation from a detached perspective. An alternative, and in our opinion preferable, type of equality could have been invoked: equality in the terms and conditions of work. This type of equality is explored in the following subsection.

## *ii. Equality of Conditions*

As noted earlier, the plaintiffs did not demand, and the courts did not address, the more ambitious goal: equality of the terms and conditions of work between Israeli and Palestinian employees. This gap between the right to equal treatment and the right to minimum conditions through core rights plagues the treatment of various weak employee groups. In regard to contract employees, for example, one can identify an agenda advocating equal treatment in relation to fulltime employees, alongside much more modest calls for joint employer-subcontractor responsibility for minimum standards.<sup>233</sup> This gap is far from trivial. At least in the present context, it is surprising as a matter of both policy and law that the courts permitted it to persist. As a matter of policy, as noted above, the differences between Israeli and Jordanian core rights, although not completely inconsequential, are relatively minor.<sup>234</sup> The same cannot be said of the differences between core rights, Jordanian or even Israeli, and those rights that some Israeli employees in the West Bank enjoy in practice. Therefore, a discourse that is limited to core rights obfuscates the disparity in working conditions between Palestinians and Israelis that would be evident if equality, rather than minimum conditions, was pursued. Legally, it is difficult to understand how the general application of Israeli labor law does *not* include the right to equal terms and conditions, given that equality is explicitly guaranteed in Israeli legislation and in collective agreements. The following sections develop this argument.

### *a. Extraterritorial Application of the Legal Right to Equality at Work*

Like most developed nations, Israeli labor law includes statutes that explicitly prohibit discrimination on a variety of grounds including sex, race, nationality and ethnicity.<sup>235</sup> Ordinarily, such legislation only applies

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233. See, e.g., Fudge, *supra* note 90, at 302, 306; Deakin, *supra* note 90, at 75, 77.

234. See *supra* text adjacent to note 25. In a dissenting opinion, Justice Cohen even added: "and if one were to claim that the [Palestinian] population in the occupied territories are entitled to enjoy the same arrangements and public life that the state grants its citizens in its territories, . . . I would answer him that, to our great shame, we in Israel are still far from the . . . arrangements that the Jordanian is trying to regulate." *Almakdassa*, HCJ 337/71 at 585 (Cohen, J. dissenting).

235. See, e.g., Equal Rights for Women Law, 5711-1951(Isr.); Equal Retirement Age for Male

territorially. Both in the US and in Europe, courts have traditionally rejected the extraterritorial applicability of a constitutional right to equality.<sup>236</sup> However, whether under the influence of international human rights law,<sup>237</sup> or other mechanisms of pressure,<sup>238</sup> the notion of such extraterritorial applicability is gaining ground.

However, at least with regard to labor law, there are suggestions that this position should be revisited. The House of Lords stated that "Employment is a complex and *sui generis* relationship, contractual in origin but, once created, having elements of status and capable of having consecutive or simultaneous points of contact with different jurisdictions. So the question of territorial scope is not straightforward."<sup>239</sup> Specifically, Guy Mundlak argues that the unique nature of labor law demands "[l]ooking for the substantive economic beneficiary" in the employment relationship, and "determining the applicable law [as] a matter of matching the appropriate legal system with the identification of economic reliance (or subordination)."<sup>240</sup> Mundlak suggests that this argument was the rationale underlying the HCJ's *Workers' Hotline* judgment: "Israel (state, employers, economy, and public) benefits from the activities of the Israeli employers in the territories, despite the fact that these territories are not part of Israel itself."<sup>241</sup> And he concludes: "Labor law is generally applied

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and Female Workers 5747-1987 (Isr.); Equality of Opportunity in Work Law, 5748-1988 (Isr.); Equal Rights for People with Disabilities Law 5758-1998 (Isr.).

236. For the US see Gould, *supra* note 11, at 502 (and references there). A certain exception is the European Directive 96/71 EC concerning the posting of workers in the framework of the provision of services, which guarantees a "posted" worker—who is sent from a home state to work temporarily in a "host state"—the right to enjoy the core labor rights (minimum wage, working time and paid holidays, health and safety, discrimination law, pregnancy and maternity protection; in the construction industry workers are also entitled to rights stemming from collective agreements which have been declared universally applicable—see Sec. 3(1) of the Directive) of the host's labor law. Directive 96/71 of the European Parliament and the Council of 16 December 1996, on the Posting of Workers in the Framework of the Provisions of Services, 1996 O.J. (L18) 1 (EC). Beyond those core rights, employers are not obligated to offer more favorable working conditions, identical to those applicable to their own workers (although there is nothing to stop the employer from doing so). For a discussion of the Directive, see Paul Davies, *The Posted Workers Directive and the EC Treaty*, 31 INDUS. L. J. 298, 303 (2002). However, the E.C.J. case of *Laval* is viewed as significantly limiting the impact of the directive. Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767. More importantly, the analogy between the cases is only partial, at best: in the "posted workers" scenario—the worker is sent by her employer from her home country to a host country; in the case under analysis here, it is the home country which extends the application of its laws to its citizens.

237. With respect to the UK, see jurisprudence on the extraterritorial applicability of the Human Rights Act, drawing on the extraterritorial application of international human rights obligations (e.g., *Al-Skeini v. Secretary of State for Defence*, [2007] UKHL 26, [2008] 1 A.C. (H.L.) [153] (appeal taken from Eng.)).

238. On the extraterritorial application of U.S. constitutional law, see *Boumediene v. Bush*, 553 U.S. 723 (2008).

239. *Serco v. Lawson* [2006] UKHL 3, ¶ 6.

240. Mundlak, *supra* note 11 at 205.

241. *Id.* at 204.

equally to all the workers in the territory who are affected by the nature of the labor market *within which the state intervenes*. . . If the application of labor law within the territory is merited by considerations of equality, then stopping at the state's border is intrinsically unequal."<sup>242</sup>

During the 1991 war in Iraq, in preparation for a chemical attack, the Israeli Ministry of Defense decided to distribute gas masks to citizens in Israel and to settlers residing in the occupied territories but not to Palestinians. The HCJ, however, ordered the ministry to issue gas masks to Palestinians living in the occupied territories. The HCJ stated, without citing any specific source, that "the military commander must treat individuals in the region equally, and must not discriminate between them."<sup>243</sup>

And yet, in the context of labor law, the courts have only partially provided labor rights to Palestinians under the principle of equality. Israel's Equal Opportunities in Employment Law (1988) ("Equal Opportunity Law"), which applies not only to public employers but also to private employers of over five persons, was not mentioned at all by the NLC. It was mentioned only once, in passing, by the HCJ in *Workers' Hotline*. In the context of the NLC's ruling, this exclusion is no surprise. Since the NLC ruled that Palestinians working in the occupied territories are not entitled to rights under Israeli labor law, its working paradigm required no referral to the Equal Opportunity Law.<sup>244</sup> The refusal of the HCJ to rely on the Equal Opportunity Law, however, is curious. The HCJ's ruling would seem to call for extending the full scope of Israeli labor law to the employment relationship between an Israeli establishment and a Palestinian employee. This would include the relevant statutes mandating non-discrimination. Moreover, even on a narrower reading of the judgment, if Israeli labor law as a whole does not extend to the West Bank, at a minimum, core protective clauses must be extended.<sup>245</sup> And since Israeli courts have repeatedly noted the *jus cogens* character of principles of non-discrimination in employment,<sup>246</sup> these principles should be considered as falling within the core rights that apply directly to Palestinians.

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242. *Id.* at 211 (emphasis added).

243. HCJ 168/91 Miladi Morcus v. Minister of Defense 45(1) PD 467, 470 [1991] (Isr.) (author's translation).

244. As noted, the NLC distinguishes the few cases that reached a different conclusion as based on the employer being a public entity. The rationale, therefore, is that the Israeli state and its organs are bound by Israeli law wherever they operate. Naturally, this rationale falls short of a wholesale application of Israeli (labor) law.

245. See *supra* Section A. Protective Legislation: Minimum Conditions.

246. See, e.g., HCJ 6845/00 Eitana Neve v. Nat'l Labor Ct. 56(6) PD 663 ¶ 50 [2002] (Isr.) (a female employee's "agreement" to waive her right to equal conditions for early retirement is void). See also discussion adjacent to note 2529 *infra*.

*b. Equality under international human rights obligations*

The notion of extraterritorial application of rights where the state exercises control is entrenched in international human rights law. While constitutional law may extend only territorially, the international human rights obligations of states extend wherever they exercise effective control.<sup>247</sup> This extension includes, first and foremost, areas under occupation. With respect to Israel and the West Bank, this obligation has been stated expressly by the International Court of Justice in an advisory opinion on Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory,<sup>248</sup> as well as by several human rights treaty bodies.<sup>249</sup> Thus, to the extent that equality in work is an international human rights norm, Israel is bound to guarantee this norm within the West Bank. The International Covenant on Economic, Social and Cultural Rights, to which Israel is party, recognizes the right of remuneration. The right of remuneration provides all employees with fair wages and equal compensation for work of equal value<sup>250</sup> without distinction of any kind. Under the Convention on the Elimination of Racial Discrimination (to which Israel has been party since 1966), states undertake to guarantee the right of any individual, without qualifications regarding national or ethnic origin, to equality before the law, notably in the enjoyment of certain rights including: the right to protection against unemployment, to equal pay for equal work, and to just and favorable remuneration. The state is also obligated to provide effective protection and remedies against any acts of racial discrimination, as well as a forum to seek reparation or satisfaction for any damage suffered as a result of such discrimination.<sup>251</sup> This enables state institutions to prosecute discrimination by private employers. At the same time, a distinction may be called for between states' obligation to respect rights, which extend extraterritorially, and their obligation to ensure the same rights. The latter obligation entails a greater intervention in private relations, constituting a greater burden on the state, which may be less appropriate for extraterritorial extension. In *Workers' Hotline*, the

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247. Human Rights Comm., Sergio Euben Lopez Burgos v. Uruguay, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40), 176 (1981); Human Rights Comm., Montero v. Uruguay, U.N. Doc. CCPR/C/18/D/106/1981 (Mar. 31, 1983); Al-Skeini v. United Kingdom, 1093 Eur. Ct. H.R. ¶ 138 (2011).

248. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 163, ¶ 109, 134-36 (July 9).

249. Human Rights Comm., Concluding Observations, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003); Committee on the Elimination of Discrimination against Women, Concluding Comments, Israel, ¶ 23, U.N. Doc. CEDAW/C/ISR/CO/3 (July 22, 2005); Committee on the Elimination of Discrimination against Women, Concluding Comments, Israel, ¶ 23, U.N. Doc. CEDAW/C/ISR/CO/3 (July 22, 2005).

250. ICESCR, *supra* note 188, art. 7.

251. Convention on the Elimination of All Forms of Racial Discrimination, art. 6, 660 U.N.T.S. 195, Dec. 21, 1965.



present case, this would imply distinguishing between the municipality of Givat Ze'ev, which is a state authority, and other, private employers.

*c. The right to equality under collective agreements*

It is somewhat puzzling that the NLC and the HCJ did not conduct a serious inquiry into the possibility of applying collective agreements to Palestinian employees. The NLC addressed the matter in an almost dismissive fashion, dedicating only the last paragraph of a fifty-page judgment to the analysis of this issue. The court stated, without elaborating, that "unless an explicit provision exists in the collective agreement to suggest its application on employees who reside in the West Bank but are not Israeli citizens—an 'Israeli' collective agreement will not apply to a resident of the region."<sup>252</sup> Arguably, however, the opposite should serve as the default position. More specifically, if no explicit provision exists, the collective agreement should apply to all employees in the firm, regardless of their national origin. Even more dumbfounding is the fact that the HCJ did not discuss the issue at all.

Otto Kahn-Freund has noted that individual labor law is easier than collective labor law to apply across national borders.<sup>253</sup> Perhaps this discrepancy explains—but does not excuse—the reluctance of the courts to delve into the latter. Within the European context, for example, the Posted Workers Directive recognizes, albeit to a limited extent, the applicability of collective agreements across borders.<sup>254</sup> Since at least one of the employers before the court (Givat Ze'ev, a municipal council) is bound by a collective agreement, it seems pertinent to address the true range of rights held by the Palestinian employees of that employer. The absence of any such discussion has concrete implications for two reasons. First, the rights guaranteed by collective agreements are more generous than those guaranteed by protective labor law. Second, since collective agreements are voluntarily signed by the parties, and are not the result of extraterritorial extension of laws, the application of such agreements is a significantly less politically charged matter than the application of Israeli laws. If the HCJ had concluded that the collective agreements were binding, this admission would have made the analysis regarding the extraterritorial application of protective labor law redundant.

The courts' reluctance to consider this avenue reaffirms Arthurs' conclusion that "[u]nions . . . have not been particularly successful as agents of extraterritoriality."<sup>255</sup> Addressing the matter through the prism of collective

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252. See *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 46. Interestingly, in the early 1970s, the Civil Administration included a clause in its contracts of employment with Palestinian residents of East Jerusalem, discussed in Makdadi, *supra* note 1799.

253. Otto Kahn-Freund, *Uses and Misuses of Comparative Law*, 37 MODERN L. REV. 1, 21 (1974).

254. See *supra* note 236.

255. Arthurs, *supra* note 149, at 548.

agreements would have permitted the courts to promote justice, by preventing Palestinian employees' discriminatory exclusion from protection under labor law, while avoiding prejudice in terms of collective interests through generalized statements incompatible with the laws of occupation.

*d. Expectations, Equality and the Juxtaposition of Power Disparities*

The HCJ's insight regarding the Palestinian employees' expectations is noteworthy. The Court notes "an expectation that certain employees would not be deprived of rights, compared with colleagues performing the same work, on the ground that different laws apply to these and to those."<sup>256</sup> The Court simply assumed that employees expect similar laws to apply to Israeli and Palestinian employees. At least as plausible, however, is the supposition that employees expect similar terms and conditions to apply. A possible counterargument is that plaintiffs did not even raise this demand, which suggests that they had no expectation of receiving equal terms and conditions as their Israeli co-workers.<sup>257</sup>

The problem in relying on the expectations of employees is that these develop within a social and economic background that is rarely egalitarian, and expectations often reflect an acceptance of unequal treatment. For this reason, courts have looked beyond the actual expectations of individual employees as reflected in their bargaining positions. For example, US and UK courts have ruled that the fact that an employer's bargaining power is greater with respect to women than with respect to men is not a sufficiently justifiable reason for wage disparities.<sup>258</sup> Lower rates for women cannot be justified "simply because the market will bear it."<sup>259</sup> The same doctrine was also adopted by the Israeli NLC, which ruled that even if a female employee demanded significantly lower pay than a male employee, it does not justify different wages under the Equal Pay for Male and Female Employees Law.<sup>260</sup>

In excluding certain extrinsic economic factors from justifiable consideration so as to prevent the Equal Pay Law from becoming a 'dead letter,' the courts follow the path drawn by Kahn-Freund, who noted that "[t]he main object of labour law has been, and we venture to say will always be, to be a

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256. *Worker's Hotline*, HCJ 5666/03 at ¶ 25.

257. For a reservation on the relevance of expectations in determining the law applicable to the contract and the inconsistency of Israeli case law, see Schuz, *supra* note 63, at 399-401.

258. See, e.g., *Hodgson v. Brookhaven*, 436 F.2d 719, 726 (5th Cir. 1970). For the UK, see *Clay Cross (Quarry Services) Ltd. v. Fletcher*, [1979] 1 All E.R. 474 (A.C.) (UK). See also Paul Schofield, *A Material Factor: Defences to Claim for Equal Pay*, 47 MODERN L. REV. 740, 742 (1984).

259. *Brennan v. City Stores, Inc.*, 479 F.2d 235 (5th Cir. 1973); *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974).

260. *LaborA 1156/04 Orit Goren v. Home Center*, ¶ 13 (2007), Nevo Legal Database (by subscription) (Isr.).

countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."<sup>261</sup>

But while the doctrine seems relatively clear, it is still necessary to identify legitimate and legal expectations in negotiations. This matter is especially important if we are to assess the expectation, noted above, of Israeli employers to pay Palestinian employees lower wages, which is in a way the *raison d'être* for their employment. The English Employment Tribunal noted that for differentiated pay between men and women to be legitimate it must be "reasonably necessary in order to obtain some result (*other than cheap female labor*) which the employer desires for economic or other reasons."<sup>262</sup> Such a reason must not only be a material factor, but also one that "right thinking people would think of . . . as a sound and tolerable basis."<sup>263</sup> If this dictum is accepted when the supply of cheap (female) labor is not attributable to any specific actor, it should be all the more so when factors well beyond 'neutral' economic forces create disparities in bargaining power, as in the case of Israeli and Palestinian employees.

If this conclusion is true in a domestic context, it seems to be strengthened in a global one, where forces and institutions are much less discernible.<sup>264</sup> Indeed, the disparity in bargaining power between Israelis and Palestinians is not an ordinary case of cliques and social milieus. The Palestinian employees are residents of territory under occupation, and belong to a community that is legally regarded as inimical to that of the employer. The Israeli employees are nationals of the occupying power, and compatriots of the employer. Consequently, in addition to being handicapped as employees bargaining with employers, Palestinians are disadvantaged in bargaining with Israelis as a result of a situation which is formally recognized and legally regulated through the law of occupation—a law which generally protects residents of the occupied territory from the occupant. But the law of occupation, discussion of which is noticeably absent from both the NLC's and HCJ's judgments, does not directly address negotiations over terms of employment: under the law of occupation, civilian nationals of the occupant are not expected to live side by side with nationals of the occupied continually for any extended period of time.

The weakness of the Palestinian employees in negotiating with Israeli employers is directly linked to the dependence of the Palestinian economy on the Israeli market, which the 1995 Interim Agreement has not diminished. This dependence is the result of Israeli policies, which have had a formidable impact on the development, or rather lack thereof, of the Palestinian economy and labor sector. Within the occupied territories, Israel took steps to limit the viability of

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261. DAVIES & FREEDLAND, *supra* note 85, at 18.

262. *Jenkins v. Kingsgate* (No. 2) [1981] I.R.L.R. 388, at 394 (emphasis added).

263. *Ojutiko v. M.S.C.* [1982] I.R.L.R. 418, 421 (cited in STEPHAN HARDY, *LABOUR LAW IN GREAT BRITAIN* 214 (2011)).

264. Arthurs, *supra* note 149, at 537 (emphasis added).

Palestinian agriculture and industry, while employing Palestinian employees in the construction of settlements and their connecting roads. These policies can only be sketched here briefly. First, Israel has not only refrained from investing its own funds in the civil infrastructure needed for the economic development of the occupied territories, but has also prevented others from doing so.<sup>265</sup> Second, Israel regulated the economy within the occupied territories in a manner unfamiliar to Western democracies. For example, only a week after the 1967 war ended, on June 18, 1967, Israel issued a military order in the territories that made it illegal to conduct business transactions involving land or property,<sup>266</sup> to conduct electricity work or connect a generator, to plant new citrus trees, or to replace old nonproductive trees without a permit.<sup>267</sup> Second, Israel initiated "New Deal" or "public works" schemes, ostensibly to prevent despair and avoid social upheaval, but also to advance security projects, such as the building of settlements.<sup>268</sup> Indeed, one might surmise that Israel intentionally obstructed the development of independent Palestinian industry so as to restrict the development of a potential economic competitor,<sup>269</sup> and in order to guarantee a regular supply of cheap labor.<sup>270</sup> As already noted,<sup>271</sup> this assessment is less conspiratorial than it may seem at first sight.

Israel's policy of "anti-planning"<sup>272</sup> and "de-development"<sup>273</sup> has led Palestinians to rely on Israel for their livelihood, resulting in the integration of the Palestinian economy into the Israeli economy. Thus, in the first two decades following the occupation of the West Bank and the Gaza strip, the Palestinian workforce has increasingly relied on work in Israel. During that period, Palestinians working in Israel received wages that were significantly lower than those of Israelis in comparable work, and in many cases were segregated into distinct low paying sectors.<sup>274</sup> This disparity was achieved, *inter alia*, through the exclusion of Palestinians from the highly dominant Israeli trade union, the *Histadrut*, thus significantly facilitating the confinement of non-citizen workers

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265. GORDON, *supra* note 2, at 74.

266. Military Order, 5727-1967, No. 25 art. 2 (Isr.); Military Order regarding Occupation in Electricity (Regulation and Operation) (Judea and Samaria), 5731-1971, No. 427 (Isr.).

267. GORDON, *supra* note 2, at 35.

268. *Id.* at 78.

269. SHALEV, *supra* note 227, at 60.

270. GORDON, *supra* note 2, at 90. This is itself a violation of article 52 of the Fourth Geneva Convention, which prohibits "[a]ll measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power." Geneva Convention (IV), *supra* note 15, at art. 52.

271. See text adjacent to note 65 *supra*.

272. EYAL WEIZMAN, *HOLLOW LAND: ISRAEL'S ARCHITECTURE OF OCCUPATION* 97 (2007).

273. SARA ROY, *THE GAZA STRIP: THE POLITICAL ECONOMY OF DE-DEVELOPMENT* 4, 128 (2001); NEVE GORDON, *FROM COLONIZATION TO SEPARATION: EXPLORING THE STRUCTURE OF ISRAEL'S OCCUPATION, IN THE POWER OF INCLUSIVE EXCLUSION TERRITORIES* 239, 247 (Adi Ophir, Michal Givoni & Sari Hanafi eds., 2009).

274. See Mundlak, *supra* note 1 at 588.

to the secondary labor market.<sup>275</sup>

Following the two intifadas, and the ensuing drop in the number of permits granted to Palestinians for entry into Israel, their reliance on the Israeli economy changed in character. The reliance went from an inter-territorial (Israel-occupied territories), to an intra-territorial (occupied territories) dependence. According to the Palestinian Bureau of Statistics, in 2010, 14.2% of the Palestinian labor force, including both employed and unemployed individuals in the West Bank, were regularly employed in settlements and in industrial zones.<sup>276</sup> To appreciate this figure, two additional factors should be considered. First, agriculture is probably the most labor-intensive sector in the West Bank and is seasonal in character. For example, 5,000 Palestinians are employed by Israelis in the Jordan valley on a permanent basis, but in the date harvest season, their numbers climb to 20,000, in that area and that sector alone.<sup>277</sup> These workers are not accounted for in the figure cited. Second, of those within the labor force, 23.6% are unemployed, a rate among the highest in the world.<sup>278</sup> Accordingly, among those Palestinians in actual employment, the rate of those employed by Israelis is much higher, reaching close to 20%. Despite reports of a thriving Palestinian economy, this trend is not changing. In fact, a recent United Nations Relief and Works Agency (UNRWA) briefing on the Palestinian labor market concluded, somewhat strikingly, that “[t]otal West Bank employment [in 2008] increased by 4,400, but all net growth occurred in Israel and Israeli settlements.”<sup>279</sup>

Although this Article deals primarily with the legal state of affairs, the economic and political dependence leads to exploitation that is even more severe than the legal analysis may indicate. Thus, although it is unambiguously clear that Palestinians working in settlements and in industrial zones are formally entitled to minimum wage, reports by NGOs,<sup>280</sup> in the press,<sup>281</sup> and in a UN briefing paper<sup>282</sup> suggest that the reality of Palestinians actually receiving such wages is the exception, rather than the norm.

Palestinians have become even more dependent on the settlements for their livelihood as a result of the restrictions on movement within the West Bank

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275. SHALEV, *supra* note 227, at 59.

276. Palestinian Central Bureau of Statistics, *Labor Force Survey 2010* at 159, 160 (Aug. 17, 2010), available at [http://www.pcbs.gov.ps/Portals/\\_pcbs/PressRelease/LabourForce\\_2010Q2\\_E.pdf](http://www.pcbs.gov.ps/Portals/_pcbs/PressRelease/LabourForce_2010Q2_E.pdf).

277. B'Tzelem, *Dispossession and Exploitation: Israel's Policy in the Jordan Valley & Northern Dead Sea* 59 (2011), available at [http://www.btselem.org/sites/default/files/201105\\_dispossession\\_and\\_exploitation\\_eng.pdf](http://www.btselem.org/sites/default/files/201105_dispossession_and_exploitation_eng.pdf)

278. UNRWA, *supra* note 5, at 2; Palestinian Central Bureau of Statistics, *supra* note 2766, at 160.

279. UNWRA, *supra* note 5, at 3 (emphasis added).

280. See, e.g., Kav LaOved, *supra* note 92.

281. Gitit Ginat, *Dates of Infamy*, KAV LAOVED—WORKER'S HOTLINE (Sept. 17, 2006), [http://www.kavlaoved.org.il/media-view\\_eng.asp?id=193](http://www.kavlaoved.org.il/media-view_eng.asp?id=193).

282. UNRWA, *supra* note 5.

since the early 2000s. Israel has imposed permanent and temporary checkpoints, physical obstructions, the Separation Barrier, forbidden roads, roads with restrictions on Palestinian use, and the movement-permit regime.<sup>283</sup> These restrictions, “unprecedented in the history of the occupation”<sup>284</sup> in their scope, duration and severity, have dismantled Palestinian sources of livelihood, led to soaring unemployment and poverty rates, and, consequently, have had a clear impact on the ability of Palestinians to maintain a significant bargaining position vis-à-vis potential or current employers. Many Palestinians cannot maintain their own businesses, since movement of goods has become expensive and even close to impossible; tourism has become non-existent; employees cannot commute and are forced to seek work close to home.<sup>285</sup> The outcome resembles a phenomenon that in recent years has been the target of criticism by scholars of transnational labor, namely the ability of corporations to move beyond national boundaries, while taking advantage of local employees’ immobility.<sup>286</sup> Global corporations and their local suppliers are depicted as agents of exploitation, taking advantage of developing countries’ low wages and weak social and environmental regulations to produce low-cost goods at the expense of local employees’ welfare.<sup>287</sup>

Another aspect of the juxtaposition of power disparities between Palestinian employees and Israeli employers lies in the fact that Palestinians who wish to work for Israelis in the settlements must receive a three-month renewable permit from the Israeli Civil Administration. The permit is given to the employer on behalf of the worker for whom the permit is issued. Permits allow workers to pass checkpoints and to enter industrial zones. The immediate consequence is a severe inhibition on the Palestinian employees’ freedom of contract. Their decision to leave a particular employer, for example, results in an immediate annulment of their permits to work in the settlement altogether and thus constitutes an obvious threat to their livelihoods. Evidence gathered by Workers’ Hotline reveals that Israeli employers use work permits as a means of extortion against workers who demand their salary, minimum wage, vacation pay, pay slips, or improvements in health and safety conditions.<sup>288</sup> The permit regime was declared illegal by the Israeli Supreme Court, insofar as it pertains to

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283. B’Tzelem—The Israeli Information Center for Human Rights in the Occupied Territories, *Ground to a Halt: Denial of Palestinians’ Freedom of Movement in the West Bank* 94 (August 2007), [http://www.btselem.org/download/200708\\_ground\\_to\\_a\\_halt\\_eng.pdf](http://www.btselem.org/download/200708_ground_to_a_halt_eng.pdf) [hereinafter B’Tzelem]. For the relevance of freedom of movement to workers, see GOULD, *supra* note 11.

284. B’Tzelem, *supra* note 277283, at 12-20.

285. *Id.* at 73-78. See also World Bank Group, *West Bank and Gaza Climate Assessment: Unlocking the Potential of the Private Sector*, Report No. 39109 – GZ, 13 – 20 (Mar. 20, 2007).

286. See, e.g., Karen Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 *TRANSNAT’L L. & CONTEMP. PROBS.* 545 (2009).

287. Richard Locke, Fei Qin, & Alberto Brause, *Does Monitoring Improve Labor Standards?: Lessons from Nike, Corporate Social Responsibility Initiative*, 1 (John F. Kennedy Sch. of Gov’t, Harvard Univ., Working Paper No. 24, 2006).

288. Kav LaOved, *supra* note 92.

foreign (migrant) employees.<sup>289</sup> The Court ruled that the “binding agreement” policy deprives a party who is already the weaker side of the labor relations of economic bargaining power,<sup>290</sup> and that it “creates a form of modern slavery.”<sup>291</sup> The employee’s basic freedom—to end an employment relationship—is impeded, and extensive documents reveal the widespread exploitation of Palestinians working for Israelis. However, as noted, an equivalent policy still holds for Palestinian employees in the settlements and in Israel.<sup>292</sup>

Finally, the political power of settlers over the Israeli political process, including the ability to secure decisions that may have direct and indirect consequences on economic relations between settlers and Palestinians, has been well documented.<sup>293</sup> Needless to say, the power of Palestinian employees does not even come close.

Regrettably, the courts completely ignored these unique circumstances. In rejecting the nexus of the contracts to Israeli law, the NLC stated that the employment relationship is a “local relationship for performance of employment in the region, and *the only international element is the identity of the employer, i.e. his being Israeli.*”<sup>294</sup> Yet the fact that the employer holds the nationality of the occupying power is an ‘international element’ that should bear on the analysis. Even when the NLC addressed the ‘unique reality in the region,’ it was content to state that the close connection between the two labor markets justifies limiting the disparities between the two systems. The Court suggested that Israeli law should apply only if Jordanian law demonstrates an “extremely unreasonable” deviation from the standards of the law of Israel and other “culturally developed nations.”<sup>295</sup> This standard for comparison is appropriate in conflicts between the laws of sovereign, culturally similar societies. However, it seems less appropriate in a case of complete domination by one state and its population over another population that is politically and culturally distinct. Instead, the court could have employed *extra caution* to create disincentives for additional exploitation, in a manner similar to the legislative approach regarding employment of foreign employees. Moreover, as has been reiterated throughout this Article, limiting ‘the disparities between the two systems’ is of less interest. When addressing exploitation, the courts should have focused on limiting, if not eliminating, the disparities between work *terms and conditions* for employees.

Furthermore, the NLC acknowledged that, while there may be gaps in work

289. HCJ 4542/02 Worker’s Hotline v. Israel (2006), Takdin Database (by subscription) (Isr.).

290. *Id.* at ¶ 29.

291. *Id.* at ¶ 4 (Cheshin, J. concurring).

292. Minutes of the Knesset, *supra* note 36, at 16-17.

293. AKIVA ELDAR & IDIT ZERTAL, LORDS OF THE LAND: THE WAR OVER ISRAEL’S SETTLEMENTS IN THE OCCUPIED TERRITORIES, 1967-2007 (Vivian Eden trans., 2007).

294. *Giv’at Ze’ev*, Labor Ct. (BS) 3000050/98 at ¶ 26 (emphasis added).

295. *Id.* at ¶ 36(g).

conditions between Israelis and Palestinians, such gaps may be justified due to particular 'circumstances.' As mentioned, it sent the cases back to the district labor courts to determine the applicable rights on their merits case by case. Its comment may be interpreted in two different manners. First, it might be an implicit effort to justify inferior terms and conditions of employment through reference to the lower cost of living of the Palestinian employees. Strikingly, this reasoning also appeared in the Attorney General's brief.<sup>296</sup> The idea that the background standard of living is a relevant consideration to the detriment of the plaintiff is a dangerous one. To give a trivial example, it would suggest that employees who live with their parents and whose accommodation expenses are completely covered are not entitled to minimum wage. In addition, such reasoning undermines the role that equality plays, in the broader sense, in social, economic and legal relationships. It means that the law has an authoritative role, not in reducing inequalities and tempering their consequences, but in reflecting and preserving the status quo and even exacerbating the implications. From a labor law perspective, such a strategy suggests a change in the delicate balance between the 'status' that shields the employees and the commercial ties that envelop them (the contract).<sup>297</sup> Labor law jurisprudence increasingly views background information (nationality of persons involved, marital status, political affiliation, etc.) as irrelevant to the determination of employment rights. The cost of living may be a legitimate ground for preferential treatment if an employer wishes to provide incentives to employees to reside in a more costly location, where the standard terms of employment are insufficient. However, this scenario is distinct from the one considered here on two counts. First, this Article is concerned not with incentives, but with equality with respect to minimum conditions. Second, preferential treatment would be permissible where the employer has a legitimate interest in employees residing in a costly location, and if all employees can choose to benefit from the incentive. Not only can Israeli employers not be said to have an interest in their employees residing within the settlements, but, more importantly, given that the Palestinian employees do not have that choice, they may not be denied the corresponding benefits.

A different way of understanding the NLC's dictum is to suggest that the Palestinians are bound by different responsibilities (national insurance, taxes, etc.), and therefore are entitled to different rights. This is also a problematic path to follow. Beyond the general argument against a blanket conditioning of rights on responsibilities, it is logically flawed in labor relations. For while the relevant employee's rights should be realized by their employers, the employees' responsibilities are owed to the government. The rights A has against B cannot be dependent upon the duties that A owes to C.

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296. Brief of the Attorney General, *supra* note 32, at ¶ 124.

297. Otto Kahn Freund, *A Note on Status and Contract in British Labour Law*, 30 MODERN L. REV. 635 (1967); Frances Raday, *Status and Contract in the Employment Relationship*, 23 ISR. L. REV. 77 (1989).



## V.

## CONCLUSION

This Article examines the reasoning of the Israeli National Labor Court and High Court of Justice in determining the law applicable to the employment of Palestinians in the Israeli settlements in the West Bank. Both courts applied choice of law rules, but reached opposite conclusions because of a different weighing of the contacts. Of particular interest is the HCJ's conclusion, based on the contact count, that Israeli law should apply. This conclusion sits well with the principle of equality as a fundamental principle of labor law.

We argue that the reference to equality is far from straightforward. In particular, we focus on the choice of the HCJ to consider equality of laws, rather than equality in terms and conditions of employment. This choice resulted in the Court's failure to guarantee the rights of the Palestinian employees both in the short term and in the long term. We also have reservations as to the recourse to equality, whether in the applicable law or even in terms and conditions of work, as a guide in a situation of extreme power disparities. We suggest that a blanket invocation of the term, without considering its wider implications when applied in occupied territory, may conflict with the long-term interests of the population concerned, helping to create a myth of a benign occupation in a context where rights are routinely denied.<sup>298</sup>

The courts' choice to disregard the contents of the employment agreements and to limit themselves to questions of the applicable law is both regrettable and confusing. It is regrettable because remaining within the parameters of contractual relationships, namely examining whether there are serious reasons to distinguish the contractual entitlements of Palestinian from those of Israeli employees, regardless of the law that applies territorially, might have allowed the court to avoid the pitfalls related to the law of occupation. It is confusing because despite the centrality of equality in the HCJ's reasoning, equality in employment terms was not, in effect, the axis of the deliberations. Instead, *Worker's Hotline* focused on equality in the applicable law.

To be sure, we do not object to the reference to equality. Rather, we argue that the Court should have taken into account the effect of different courses of action on the right of employees to equality. If the Court had referred to equality in terms and conditions rather than to equality in the applicable law, its judgment would have carried greater benefits for Palestinians as a weak employee population.

The analysis above should assist in responding to two central objections to the focus on equality. One possible objection is that the principle of equality guarantees beneficial terms and conditions to Palestinians only when they work

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298. KRETZMER, *supra* note 105, at 198; Gross, *supra* note 214, at 8; Sfar, *supra* note 18, at 166.

for Israelis, and not when they work for Palestinians.<sup>299</sup> This may increase the dependence of Palestinian labor on Israeli capital. However, it cannot be ignored that the recourse to equality is meant to mitigate a particular type of exploitation that only applies when Israelis employ Palestinians. The alignment of Israeli employees (against whose rights the Court examines the rights of Palestinians) characterizes the many cases involving the Israeli government as an employer (via the Civil Administration or municipal councils) and as a holder of military and legal power (through the military commander), as well as cases involving Israeli private businesses. Such an alignment demands a judicial safeguarding of the rights of those who are in danger of severe economic exploitation, who are politically disenfranchised, and who, unlike citizens, are unable to convert their political capital to economic gains.<sup>300</sup> Needless to say, this scenario does not take place in the parallel situation, that of Palestinians being employed by Palestinians, and therefore does not require a similar measure.

Lastly, one could argue that equating the terms and conditions of Palestinian labor with those of Israeli employees might undermine the incentive for Israeli business to operate in the occupied territories. As a result, the livelihood of the Palestinians would be put at a detriment. In other words, if Israeli businesses operating in the occupied territories are denied the economic advantages they were accustomed to, they may opt to return to Israel or to move elsewhere in search of cheaper labor. This, of course, is a common argument that fuels the notorious 'race to the bottom.' It is not only morally suspect (being an effective 'allow me to offer you sub-standard conditions or I'll leave'), it has also been proven to be overinflated: businesses (especially those owned by settlers who reside in the occupied territories, and those that rely on the territories' natural resources) do not relocate with such ease. Israeli government employers operating in the occupied territories certainly cannot relocate. Furthermore, the relocation of Israeli businesses back to Israel would not necessarily be to the detriment of Palestinians. In effect, this dynamic may counteract the crawling annexation. If Israeli businesses relocate from the occupied territories, the economic vacuum may well be filled by Palestinian businesses, thereby benefiting the Palestinian economy directly.

The critique in this Article is offered in full appreciation of the genuine attempt by the courts to impose a rule of law in the face of an anomalous situation. It has been asked in the past whether the attempt to offer legal redress in an anomalous situation should be abandoned altogether, as it perpetuates the anomaly. We do not necessarily ascribe to this position. Indeed, the laws of armed conflict, on which the entire situation rests, signify the abandonment of the 'progress through catastrophe' approach, suggesting that progress requires

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299. Such as might be the case of Palestinians employed by Palestinians in the Occupied Territories, where there is no Israeli involvement, such that complaints are unlikely to reach Israeli courts because of *forum non conveniens*.

300. For a discussion of the parallels between political and labor citizenship, see Gordon, *supra* note 11.

rule of law. At the same time, the shaping of that law must not be carried out in the abstract. While the courts should steer away from high politics, they must take cognizance of politics in their deliberations. Where political forces affect their rulings, they must be realistic about the prospective consequences of such rulings. This is essential if they are to offer redress in either the immediate or long term.

The focus of this Article is on the law governing the employment relationship between Israeli employers and Palestinian employees in industries operating in the West Bank. The length of the Israeli occupation, and the social and economic entanglement that derives from it, have consequences for a wide variety of relationships, including employment relationships, and we hope that our analysis may shed some light on the concrete legal, political and social implications. Despite the idiosyncrasies of the Israeli-Palestinian situation, parallels may already be drawn to other, perhaps less severe and certainly less lengthy, situations. American and European companies have been operating in Iraq and Afghanistan, taking advantage of the needs of the military operating there along with its significant *de facto* control of decisions being made. Not enough attention is directed to the terms and conditions of local workers employed by these corporations, and perhaps it would be judicious to pay such attention sooner rather than later.

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